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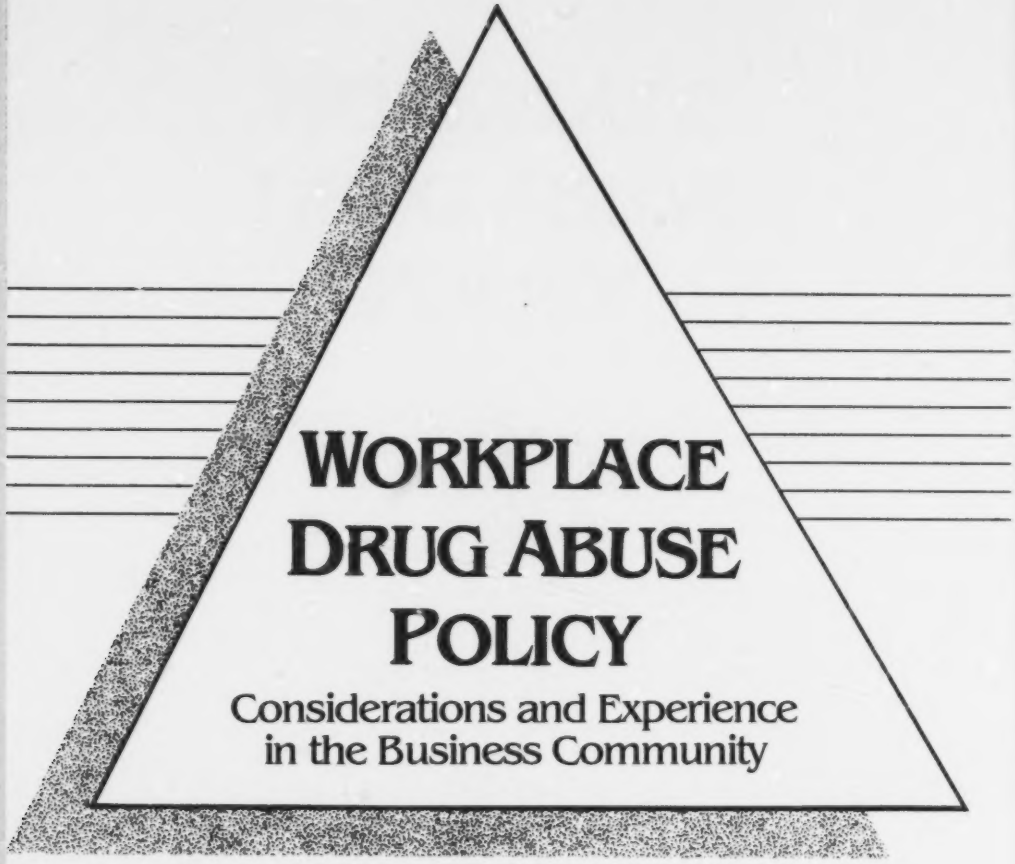

WORKPLACE DRUG ABUSE POLICY

Considerations and Experience in the Business Community

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Alcohol, Drug Abuse, and Mental Health Administration

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National Institute on Drug Abuse

WORKPLACE DRUG ABUSE POLICY

Considerations and Experience in the Business Community

Editors:
J. Michael Walsh, Ph.D.
Steven W. Gust, Ph.D.

Office of Workplace Initiatives
National Institute on Drug Abuse

Acknowledgements

This publication is based upon papers and discussion from a conference titled "Interdisciplinary Approaches to the Problem of Drug Abuse in the Workplace" held on March 6 and 7, 1986 in Bethesda, MD. The editors wish to thank the authors and staff for their contributions, patience, and interest in the important and emerging area of drug abuse in the workplace.

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Section 1

Introduction and Summary

INTRODUCTION AND SUMMARY

J. Michael Walsh and Steven W. Gust
Office of Workplace Initiatives
National Institute on Drug Abuse

The concept for bringing together representatives of the business, industry, and labor communities to discuss issues surrounding drug abuse in the workplace resulted from the increasing number of inquiries received by the National Institute on Drug Abuse (NIDA) from private sector employers. In 1982, widespread publicity associated with the military drug program began to spark interest in the private sector regarding new approaches to the ever increasing awareness of drug-related accidents/incidents and associated corporate liability in the American workplace. Over the next 2 years, there was a quiet but progressive growth in the number of companies implementing drug policies. Initially, this phenomenon was focused in major transportation and oil industries, where health and safety concerns were used to justify such programs. Despite a number of companies establishing policy, a great deal of controversy surrounded the issues, especially the appropriate use of drug detection technology.

A conference was planned for March 1986 to assemble representatives with experience in the legal, technical, and policy considerations involved in drug testing. They were to discuss the growing problem of drug abuse, its impact on American business, and utilization of drug testing within the workplace environment.

The meeting was organized by NIDA with invaluable assistance from a small group of planners. The original planning committee consisted of representatives from the IBM Corporation, General Motors Corporation, United Auto Workers, the American Council on Drug Education, and Hymen, Phelps, and McNamara, a Washington, D.C. law firm

specializing in drug law.

The primary goals of the meeting were: (1) to develop a consensus on the need to address the problem of drug abuse in the workplace; and (2) to recommend procedures for establishing a fair and sound drug program. Such a program would address the needs, rights, and responsibilities of both employee and company. The increasing utilization of drug screening technology by employers has generated a number of legal, ethical, and technical issues. These topics were discussed in detail.

The program was designed to allow speakers to address issues pertinent to establishing, implementing, and enforcing a drug policy or program. These issue areas included: legal, ethical, medical, technical, safety, security, labor, employee relations, employee assistance, and employee benefits. Formal presentations were made on the first day of the program. Consensus panels were convened during the evening for drafting answers to several specific questions relating to drug abuse issues from the unique perspective of each group. There were three consensus panels: (1) Health and Safety; (2) Legal and Ethical; and (3) Human Relations. Each included 10 to 12 members. Panel members included speakers and selected participants. To provide appropriate balance, each panel included experts as well as representatives from outside the specific topic area.

Prior to the conference, each panel chairman identified issues relevant to drug policy development and implementation from the perspective of the panel area. These issues formed the basis of questions for panel deliberation. The task for each panel, therefore, was to formulate suggested guidelines for business, industry, and labor, for achieving an effective and fair policy.

On the second day of the conference, panel chairmen drafted a consensus statement addressing general areas of interest and reflecting agreement of the separate panels. Drafts of the consensus statements and the chairmen's overall statement were presented for discussion in an open plenary session. All participants had the opportunity to comment and suggest revisions at this time. Final consensus statements are included in Section 5.

These papers were presented during the workshop and provide a discussion of the legal, scientific, and labor relations considerations which companies encounter— considerations they will continue to address when establishing and implementing drug abuse policies and drug testing pro-

grams. The combined expertise and experience of the authors provide a broad-based assessment of issues surrounding drug policies in industry; it also provides sound, practical advice for companies considering such programs.

The first group of papers, **Legal and Technical Considerations,** begins with a discussion by Dr. Finkle. He writes about the technical problems of drug testing in the face of burgeoning demand. He discusses the general perception that such techniques are a "quick and dirty" solution to the problem of drug abuse in the workplace. Reliable techniques for detecting and quantifying drugs in urine are available. However, to insure valid results that can withstand legal challenge, qualified staff must apply these techniques within a well-designed, quality-controlled, and proficient program.

Mr. Mason addresses legal issues and provides some guidance and advice based upon experiences with the Federal Railroad Administration. The author notes that: (1) urinalysis cases are and will continue to be brought before the courts, and (2) the ability of these programs to withstand legal challenge will depend greatly on the care with which they are designed and implemented. The author further highlights the importance of: (1) employee education and acceptance of the program; (2) structuring a program on sound goals; (3) tying the program to those goals; (4) testing under appropriate conditions; and (5) clear and fair consequences of positive tests. Finally, he discusses the fourth amendment protections against unreasonable search and seizure; he argues that urinalysis programs, when conducted appropriately, should be recognized as "reasonable."

Mr. Adler represents the American Civil Liberties Union. He takes a different stance in arguing the "reasonableness" of such programs, discussing a number of constitutional and other issues relevant to protection of individual rights. Of primary concern is protecting individuals' right to privacy. Mr. Adler raises interesting and provoking questions regarding the balance between individual privacy rights and employer interests. He argues that issues such as probable cause, particularized suspicion, appropriate safeguards, interpretation of results, and stigmatization of drug users need to be thoroughly considered by any company considering a drug testing program.

Unresolved legal and ethical concerns regarding drug testing remain. However, many companies have implemented drug programs with drug testing components that have withstood legal challenge. If a program is

on firm legal ground, other considerations need to be addressed to ensure its success. Of paramount concern is its degree of acceptance by the workforce. Most successful programs have a high degree of visibility and support from employees. These programs, which tend to be developed and implemented with employee input, are based upon the need to provide a safe workplace; they are generally viewed by employees as being nonpunitive in nature. The best programs focus on helping drug-abusing employees get the treatment they need and return to the job. The papers in the **Human Relations Concerns** section address drug testing from the perspective of individuals involved in employee interactions with management—labor-management arbitration, Employee Assistance Programs, and labor unions.

Ms. Denenberg illustrates an arbitrator's view of the range of approaches that businesses have taken to deal with the problem of substance abuse. She believes that the best approach is therapeutic rather than punitive. She describes several successful programs that involved negotiation between labor and management.

Dr. Masi outlines the structure and function of Employee Assistance Programs (EAPs) in industry. She describes their current and potential roles in providing assistance to troubled employees. Finally, she details the growing expansion of such services to drug-abusing employees.

Although the number of EAPs is growing, it is the larger companies that tend to have the resources and interest in creating such programs. Most small businesses do not have facilities for in-house treatment, resources for referral to outside agencies, or even health insurance for substance abuse disorders. Mr. Ozga highlights issues pertaining to drug abuse from a small business perspective. He emphasizes possible approaches small businessmen can take to provide effective diagnosis, referral, and treatment for employees.

Representatives from two large labor unions have contributed to this monograph. They bring an important perspective and raise critical questions on testing programs. Mr. Pasco, of the United Auto Workers, outlines his union's activities in helping employees with substance abuse problems through the EAP and offers some alternatives to drug testing. Of key importance, he believes, is the basing of action on deterioration of job performance. Mr. Tuggle, of the United Steelworkers of America, points out the dangers of indiscriminate random screening. He emphasizes the need for careful planning and development in those few labor-involved policy cases where urinalysis may be appropriate.

Despite the myriad legal, technical, and labor relations issues involved in developing a drug testing program, many employers have successfully dealt with these hurdles. Many have developed programs that have proven effective and cost-beneficial. The final group of papers, **Successful Corporate Programs**, describes the experiences of some large corporate employers from major sectors of industry. It provides useful advice and background information on the issue of drug testing in the workplace.

Dr. Cannella outlines the experiences of Mobil Corporation, and its policy evolution over the last 25 years. The policy is based upon a work rule. It includes appropriate employee and supervisory training, preemployment and for-cause drug testing, and medical review of all urinalysis results.

Dr. Curtis, from Westinghouse Corporation, notes that detection and diagnosis of substance abuse is problematic in the workplace environment. Medical staff and management are typically not trained to make subtle judgments or consider substance abuse as the source of a problem. He suggests that diagnosis may be improved by better patient histories and observation. Companies must motivate and educate physicians to improve their awareness of the problem. They must establish sound technical programs. And they must improve managers' skills.

Ms. Thorne, from the Washington Metropolitan Area Transit Authority, documents a labor-management negotiated program's development in the aftermath of a drug-related rail accident. Her account details how a successful drug-testing and rehabilitation program evolved through a sometimes arduous and time-consuming process.

Dr. Wick aptly discusses the special responsibilities of common carriers that provide transportation services to the general public. The extraordinary standards of responsibility to ensure a drug-free workforce, he points out, extends to all levels of employment—from pilots to baggage handlers to reservation clerks. He cites some revealing facts about the American Airlines experience in their pre-employment screening program.

In summary, this conference marked the first major federally-sponsored meeting of private sector representatives to discuss the problem of drug abuse in the workplace and to set down ground rules for future policy development.

In addition to opening discussion of the issues, the meeting provided a focus within the Federal Government at NIDA to provide direction, leadership, and a centralized information and technology transfer resource on these issues. The meeting also produced recommendations for future research and legislative action. It identified specific goals for drug testing laboratory certification. Finally, it determined technical and scientific standards for drug testing to serve as a model for private sector employers.

The papers that follow provided a framework for the consensus statements. In a very real way, they have shaped the nationwide activities that have moved the American workplace closer to the goal of being drug-free.

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Section 2

Legal and Technical Considerations

TECHNOLOGICAL ISSUES ASSOCIATED WITH MONITORING DRUG USE IN THE WORKPLACE

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INTRODUCTION

The annual cost to industry of employee drug and alcohol use has been estimated as high as $100 billion.[1] It is not surprising, therefore, that in 1986 approximately 25 percent of Fortune 500 companies screened job applicants or current employees for use of illegal drugs. In addition, many sporting events and athletic organizations, led by the International Olympic Committee, now have, or are considering, programs for testing participating athletes for drug use.

Agencies of the U.S. Government have taken an even more aggressive approach to identify drug abusers; for example, in 1982, the Department of Defense (DOD) began a large-scale drug testing program which will eventually require every member of the military to undergo a urine drug screen several times a year.[2] Also, the Federal Railroad Administration recently adopted regulations requiring urine drug screens for all persons responsible for operation of trains.[3] The Department of Transportation is in the process of implementing similar regulations for persons engaged in interstate transportation.

The evidence is overwhelming that drug testing is becoming an accepted part of our society's attempts to regulate its own behavior in the best interests of public health. Increased drug testing creates demand for

1. Harwood, H.J., Napolitano, D.M., Kristiansen, P.L., Collins, J.J., *Economic Costs to Society of Alcohol, Drug Abuse, and Mental Illness: 1980*. Report submitted to the Alcohol, Drug Abuse, and Mental Health Administration, U.S. Department of Health, 1984.
2. Willette, R.E., Drug Testing Programs. *NIDA Monograph No. 73*, 1986, p5.
3. *Federal Register*, Aug. 2, 1985, USO No. 140 31508, Part V.

more high quality drug testing facilities. The number of drug tests required by Federal programs alone will far exceed the capacity of laboratories currently performing such assays. The need for high quality drug testing facilities is amplified by the recent finding that many of the laboratories now performing drug analyses do not use adequate quality controls and are deficient in other areas, so that the test results are often disturbingly unreliable.[4]

Clearly, the number of urine specimens that will have to be analyzed will be in the millions. Generally, the tests will include a screening procedure in which urine specimens are analyzed for one or more abused drugs by means of relatively rapid and inexpensive tests, typically either an immunoassay (RIA, EMIT, TDX) or thin-layer chromatography (TLC). The charges for screening tests now vary from a few dollars to 20 dollars or more per specimen; the charge depends upon the actual methods used, the number of specimens submitted, required turnaround time, and the amount of documentation required (e.g., chain of custody, quality control data, evidence of certification).

Since the possibility of legal action always exists, those specimens which screen positive require an additional and more expensive confirmation analysis. In some cases, the confirmation may be simply a retest using an alternative analytical procedure; however, confirmation by a method involving gas chromatography/mass spectrometry (GC/MS) provides the best level of confidence. [5] Consequently, the DOD and other organizations now require all confirmations to be performed using a GC/MS procedure. Charges for these confirmations range from about $25 to more than $100 for each drug in each urine specimen. The number of screened-positives that will have to be confirmed by a GC/MS analysis depends on many factors; typically, however, 5 to 10 percent of the urine specimens screened in the DOD program are found positive for one or more illegal drugs. The proportion of presumptive positives found within the civilian population has varied enormously depending upon the study, usually falling within the range of 10 to 20 percent.

In short, a lot of money can be made in drug testing. The lure of such revenues, in the face of competition, can cause serious compromise of laboratory practice and quality.

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4. Davis, K., Hawks, R., Blanke, R., Assessment of Laboratory Quality in Urine Drug Testing, *JAMA*, Sept. 23, 1988, Vol. 260, No. 12; Drug Lab Criticized for Errors - Policies, *Army Times*, Nov. 1985; Too Many Bugs in Screening Measures, *Wall Street Journal*, Apr. 14, 1986.

5. Hoyt, D. W., Finnigan, R. E., Nee, T., Shultz, T.F., Butler, T. J., Drug Testing in the Workplace - Are Methods Legally Defensible?, *JAMA*, 1987, Vol. 285, No. 4, 504 -509.

LABORATORY STANDARDS AND RELIABILITY

Many laboratories are currently doing some type of drug testing for a fee, but few are widely recognized and respected for their capabilities and reliability. Drug-testing laboratories are generally not required to meet certification standards or to participate in proficiency testing programs.[6] One consequence of this laxity is that laboratories of dubious quality are relatively easy and inexpensive to set up; testing in these laboratories is often based on simple thin-layer chromatographic or immunological methods performed by inadequately trained technicians, and overseen by toxicologists who have had little previous experience with appropriate analytical methods and, so, are less likely to render a credible professional opinion when reviewing test data.

It is not surprising, therefore, that a blind proficiency study by the Centers for Disease Control found only 3 of 13 laboratories performing acceptably in analysis of all 5 of the most commonly abused drugs.[7] Furthermore, the Center for Human Toxicology at the University of Utah and Compuchem, Research Triangle Park, were the only civilian laboratories certified by the DOD to test urine for military personnel for marijuana and cocaine in 1986.

Unfortunately, as long as a significant number of drug-testing programs choose an analytical laboratory strictly on the basis of cost, the quality of drug tests will continue to be a problem. More and more organizations are coming to recognize that two conditions are essential for a drug-testing program to be effective: the test results must (1) be accurate, and (2) sufficiently well-supported by quality control data to withstand scrutiny by experts in court.

LESSONS FROM THE SIXTIES

Many lessons were learned during mass urinalysis for drug abuse control purposes during the late 1960s. Drug testing programs, such as those conducted to support methadone treatment clinics, probation, and rehabilitation programs, were not scientific research laboratories but rather urinalysis factories. These programs found that conducting this exact analytical science on such a large scale required skills and

6. Editor's note: Since this chapter was written Federal law has required the establishment of a certification program for laboratories providing drug testing services to Federal Agencies. Standards were published in the *Federal Register* on April 11, 1988.

7. Hansen, H. T., Caudill, S. P., Boone, J., *JAMA*, 1985, Vol. 253, 2382-87.

techniques in managing what amounted to a conveyor belt operation. They also found that detailed quality control and built-in safeguards were essential for the resulting reports to be accepted as credible and believed in a legal setting. In this context, there is a sense of deja vu in our present situation almost 20 years later.

FORENSIC TOXICOLOGY

What is a forensic toxicology case? It is any situation involving one or more individuals, living or deceased, in which it is suspected that drugs, poisons, or other xenobiotics may have played a role which wholly or in part accounts for the case circumstances into which there is legal inquiry. The forensic toxicologist begins by trying to state clear questions that address the case problem to be answered. Without this clear statement of purpose, the toxicologist will be involved in little more than a fishing expedition or data gathering exercise that is unlikely to prove rewarding or relevant to the legal inquiry.

It is, therefore, extremely important that the agency which the laboratory serves makes very clear its expectations of the analyst and the analytical results. If qualitative detection and identification of any drug or metabolite present in the urine is the limit of expectation, then the laboratory should understand this limit. On the other hand, if the agency expects professional interpretation of the result with respect to possible impairment or time of ingestion or safety consequences, then the extent to which the analytical results will lend themselves to interpretation must be known and understood beforehand.

Those involved in drug testing programs need to ensure that testing will be properly conducted and the significance of the results properly interpreted. At the very least, these assurances are owed to the subjects who are tested. This is particularly important if civil or criminal litigation is anticipated.

In a "Letter to the Editor" in the *Journal of American Medical Association* Arthur J. McBay correctly states:

> The substances most often requested are controlled substances such as marijuana and cocaine but there are many other identifiable compounds both legal and illegal that are more likely to impair. Although alcohol impairs more people more frequently than all other drugs, tests for it are not usually included or requested.[8]

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8. McBay, A.J., *JAMA*, 1986, Vol. 255, p.40.

Further, the letter states "evidence should be available that the methods used adequately identify and can quantitate the drug when the results are to be used in adversarial proceedings." Most laboratories and personnel offering such analyses are not accustomed to the requirements for handling, examination, and documentation of evidence and findings in such a way that the results will be acceptable for use in legal proceedings.

Not all drugs and their metabolites can be detected in all biological specimens at any particular time; therefore, the choice and availability of samples for analysis are crucial. Obviously, specimens from living individuals are limited, and generally only blood (or plasma), urine, and saliva are available. Apart from alcohol, the most commonly abused drugs and their metabolites are readily detected in urine samples and, in some cases, can be quantified. Providing the test method is adequately sensitive, a qualitative result is often sufficient. Results of urine testing cannot with any reliability provide interpretation with respect to impairment or likely time of ingestion. If these issues are important, then a blood (or plasma) sample is required for quantitative analysis; even then it may not always be possible to provide a definite answer to the question of impairment at a particular time.

The analyst must know and state the sensitivity limit of each analytical method; then, a report indicating that no drugs were detected in the sample has meaning with respect to some minimum detectable value. Generally, in forensic toxicology, sensitivity limits should at least be (1) within the concentration range known to be therapeutically effective for a drug and (2) within the concentration range for excreted metabolites as determined by previous clinical research studies on the biodisposition and metabolism of the drugs. This information is available for most of the common drugs of abuse.

FUTURE OF DRUG TESTING

The accuracy and precision of quantitative methods should be determined and documented in every laboratory. Standard deviations or coefficients of variation of 5 to 10 percent at a reasonable toxicological concentration are acceptable for most chromatographic procedures, even though some methods can achieve better precision than this.

Experience has taught that revolutionary change for the better in analytical toxicology has occurred only rarely. Progress in chemical techniques and instrumentation during the past 20 years has been the

result of social and medical demand. This need for increasing numbers of toxicology tests which can detect a vast array of drugs and metabolites has given rise to some imaginative test methods for both screening biological samples and confirming positive findings. The choice of test methods should ideally reflect a conservation of cost and analyst time. In the crisis environment of the drug abuse test laboratory, the demand for speedy, simple answers to complicated forensic questions is onerous in the extreme. Perhaps the only thing that is certain is that this demand will accelerate. The techniques to do the job well are available.

Alcohol is omnipresent. It can be confidently assumed that alcohol will continue to be a complicating factor in drug intoxications. Instruments which can quantitate alcohol concentration in breath, blood, and urine are available and well-proven. The major classes of abused drugs will continue to appear in various combinations including narcotic analgesics, sedative hypnotics, central nervous system stimulants, and the cannabinoids. The currently available immunoassays for these drugs are unlikely to be improved significantly in the near future. Reference confirmatory methods using gas chromatography with selected detectors and mass-spectrometry are also available.

The observations above imply that new analytical approaches meeting drug abuse criteria will be built around immunoassays. Eventually, reagents that comprise multiple antibodies will make it possible to accomplish rapid qualitative screening for different classes of drugs in one test. At the other extreme, the development of highly specific monoclonal antibodies targeted to particular drugs or their metabolites should become a reality. Metabolites increase in importance as the need to detect drug use, long after the parent drug has been transformed or excreted, becomes a routine requirement. Sensitivity limits which are frequently a hindrance in all but radioimmunoassays will likely be overcome by development of new and novel chemical labels and detection devices. Automated fluorescent immunoassay instruments are the most likely answer, referenced by GC/MS methods.

ACCURACY AND PRECISION

There always seems to be a simple and elegant solution to any difficult and complicated problem, but, unfortunately, that solution is usually wrong. The seduction of simple approaches must be resisted. A good example lies in the availability of conventional chemical tests packaged as commercial kits for urine screening purposes. It is of great importance that we exercise a high level of skepticism and concern about the quality and applicability of commercial chemical kits. This analytical work is

not kitchen chemistry by recipe. Exercising concern means validating all kits and chemical tests likely to be used in the drug abuse laboratory against a reference procedure.

There is a natural tendency to think that toxicology tests for drugs of abuse will be "quick and dirty" qualitative tests and not subject to the usual rigorous quality assurance procedures practiced, for example, in clinical laboratories. However, no matter how "quick" or how "dirty" the test, the result is of little use unless the reliability is known in terms of specificity, sensitivity, accuracy, and precision. No absolute standards of quality, no statistics reflecting accuracy and precision, can be given as dogma applicable in every drug abuse laboratory. The analyst must know the limitations of the test and must have available a reference or confirmatory method in the laboratory that has carefully documented analytical specifications.

It is of the utmost importance for any analytical toxicology laboratory to have a rational program for use of standards, reference materials, and controls—if qualitative and quantitative statistical quality assurance is to be used to authenticate analytical data. A control is a biological specimen supplemented with a drug to a known concentration. This specimen is then analyzed at the same time as the unknown to control the quality of the analysis. A blank is a specimen identical in composition to the control, but it does not contain the drug or chemical being assayed. Blanks are analyzed to eliminate systematic error caused by "background." Background is artifactual interference from any material in the control or analytical sample that may cause either a false positive or a false negative measurement error. A blind control should be analyzed with each batch of specimens.

It is important to appreciate some additional working definitions that have a bearing on quality assurance: the term "negative" should be defined by the limits of sensitivity, that is, the lower limit of qualitative detection. The quantitative sensitivity limit may be substantially greater and should be set at a concentration that provides acceptable statistics to support the value. The sensitivity should be expressed as a concentration in the biological specimen analyzed, in this case urine.

Accuracy can be defined as correctness, the closeness of a measured concentration value to the known true or target value. Unfortunately, no analytical methods are available other than the replicate analysis of reference standard solutions by (1) using at least two different analytical procedures, one of which should be GC/MS (if a quantitative reference method exists); and (2) having more than one analyst analyze the solution. Analysts then can statistically evaluate these data for stan-

dard deviation and establish a concentration of known value. This solution can then be used as a control when working analyses are performed.

Precision is equally important in repetitive analysis. It is a measure of the reproducibility of a method when multiple measurements are made on the same sample under the same analytical conditions. The observed values may differ from the true or target values without affecting the precision of the analysis. A laboratory should determine precision within a set of samples on a given day, as well as the day-to-day precision of the method. It is important that all these data be maintained for legal inspection and audit.

The possibility of clerical errors in reports or other faults in the logistical support system should not be overlooked. Often, the final report undergoes cursory inspection by the analyst and the supervisor, and no written procedure exists to make this important quality control point a practical policy. Each written report should be checked by the analyst and authenticated with the supervisor's initials. This end point of all laboratory work is one of the most common entry points for error in the long laboratory process. Many publications in the scientific literature deal with the fundamentals of practical quality control.[9]

External proficiency testing should be mandatory. The poor performances of laboratories based on specimens supplied by the Centers for Disease Control further emphasize this need. The College of American Pathologists has a program which is voluntary and requires subscription, but it could be used to assess the proficiency of analysts.[10]

No matter how well a laboratory appears to be operated or how marvelous the methods and techniques used, the real keys are the analytical toxicologists themselves, their professional standards of practice, and their technical expertise. By virtue of their academic training and professional experience, they must be credible to the courts. Ideally, the toxicologist should have had training and experience that led to Board Certification in forensic toxicology through written examination and inspection of credentials. This certification should be current and based upon periodic re-examination and continuing educational activities. The toxicologists should be eligible for acceptance into the American Academy of Forensic Sciences' Toxicology section.

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9. Finkle, B.S., *J Analytical Toxicology*, 1983, Vol. 7; Horowitz, W., *Analytical Chemistry*, 1982, Vol. 54; Taylor, J.K., *Analytical Chemistry*, 1981, Vol. 53.

10. Editor's note: The National Institute on Drug Abuse has also developed a certification program which includes proficiency testing requirements.

In addition, toxicologists should be anxious to submit to external proficiency testing, which involves prepared simulated case specimens containing drugs or metabolites in known concentrations sent to their laboratories for analysis. The performance data can be used as a laboratory management tool to improve performance; or, most importantly, these data can be used to determine very clearly areas in which education or development are required. This last aspect, of course, leads to the need for reference laboratory centers (preferably in universities) which can offer workshops, seminars, and other educational activities to practicing toxicologists.

Forensic toxicology proficiency testing lags far behind its clinical medicine counterpart. This must be corrected if the results reported from these laboratories are to be used legally in a way which may sanction the accused subject.

CONCLUSION

In summary, it is clear that the analytical techniques are available to reliably detect and, if necessary, quantify drugs of abuse and their metabolites in urine. A variety of different immunoassays are likely to remain at the heart of initial screening methods, with only confirmations of positive findings by chromatography, but with an increasing emphasis on GC/Mass Spectrometry.

The quality of work in laboratories which may make considerable financial gain through increased volume of work must be guarded by both internal quality assurance and external proficiency testing. However, the primary mechanism for safeguarding quality of work lies in ensuring that the senior staff are truly forensic toxicologists with adequate credentials and experience. This is simply not the case today.

For the past 20 years, the toxicologist has played an increasingly important role as an ombudsman of public health issues. This new dimension of professional responsibility is of almost frightening proportions. The alarm that is rightly felt in the profession can only be assuaged and brought into perspective by increasing the knowledge base from which toxicological opinions are rendered. This means more scientists and better trained professionals must be attracted into the

field. Just a few areas of immediate need have been mentioned, but they are critical. These areas cannot be avoided; they must receive appropriate attention very soon.

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CONTROL OF DRUG ABUSE IN THE WORKPLACE: INDIVIDUAL EXPECTATIONS, PRIVATE CONTRACTS, AND CONSTITUTIONAL VALUES

John M. Mason[1]
Federal Railroad Administration

PREFACE

Those who advocate affirmative measures to control drug abuse in the workplace are now riding high, as more and more corporations enter the arena of drug testing, and many government agencies scurry to catch up with the private sector. Millions of American workers presently troubled by drug abuse are being confronted with substantial economic incentives to abate their habits or obtain necessary treatment. The desired benefits may be measured in lives saved, injuries prevented, economic waste avoided, and quality of life — indeed, the strength of the social fabric — enhanced. But the rapidity with which change is being effected carries with it substantial risks of major mistakes, in program design or program execution, or both. It is still possible for the forces of change to snatch defeat from the jaws of victory.

Government, labor, and management all have a critical stake in promoting the development of reasonable responses to this societal problem. All sectors must avoid the kind of simplistic approaches that force labor and management, or government and regulated industry, apart: a polarization that breeds distrust, not communication; promotes litigation instead of efforts in common; and, most important, drives the substance abuse problem further underground. We must proceed with caution, carefully considering what it is we hope to achieve, what means we intend to employ, and what costs will be incurred. Like any hard problem, a resolution is not a matter of magic.

Control of drug abuse in the workplace will always require a mix of strategies: supervision, employee assistance programs, prevention

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campaigns, and clear policies and sanctions. Although disagreements can arise in any of these areas, it is clear that detection of drug use through urinalysis is presently the single greatest point of contention between employees and employers. Urinalysis is controversial for many reasons, including alleged lack of reliability, but the major objection of employees, in the end, may very well be a subjective one: the gut instinct that surrendering a urine sample to be tested for signs of substance use and abuse is an unfair and unwarranted intrusion into privacy.

IMPORTANCE OF EMPLOYEE ACCEPTANCE

Adverse employee reaction to drug urinalysis may sometimes be ill-formed, and grossly so. Attitudes of many may change quickly when the newness of drug testing wears off. Nevertheless, managers should take employee resistance seriously not despite but precisely because of the fact that the personal dignity issue is so heavily laden with emotion. Depending upon the context, resistance may reflect a deep-seated conviction that the employee is being treated unfairly. Employee morale can be badly damaged, and the workforce attitude toward testing irrevocably tainted, by a drug testing program that is poorly conceived or implemented, however well-intentioned management may be. And even a program that is well conceived and implemented will have its costs.

This cautionary word applies with at least equal force to the public sector, where preventive efforts are motivated not by private profit but by the public interest more broadly defined. For example, as an agency with an important safety mission, the Federal Railroad Administration (FRA) is obviously anxious to reduce drug abuse in the railroad workforce, thereby promoting the goal of a safe rail transportation system.[2] But in pursuit of this one goal it should not be forgotten that railroad employees are responsible on a daily basis for ensuring compliance with a wide

2. FRA, a modal administration of the U.S. Department of Transportation, issued a final rule on Control of Alcohol and Drug Use in Railroad Operations on July 31, 1985 (50 Fed. Reg. 31508; Aug. 2, 1985), which is codified at 49 C.F.R. Part 219. Rail labor sued in Federal court to enjoin the FRA rule, principally on Fourth Amendment grounds, but the Northern District of California rejected the challenge and the rule became effective in February 1986, following a highly unusual Supreme Court order vacating, by unanimous vote and without an opinion, a stay of the FRA rule pending appeal that had been entered by the Ninth Circuit. *Dole* v. *Railway Labor Executives' Ass'n*, 474 U.S. 1099 (1986). Two years later, a sharply divided Ninth Circuit panel struck down as unconstitutional the FRA rules requiring testing of the train crew for alcohol and drugs following a major train accident and allowing railroads to test an individual involved in a minor accident or safety violation. *RLEA* v. *Burnley*, 839 F.2d 575 (9th Cir. 1988). *Certiorari* has been granted in that case by the Supreme Court. *Id.*, No. 87–1555.

range of federal and industry safety standards, only one of which is the prohibition of alcohol and drug use. If employees, at bottom, perceive the alcohol and drug regulation as fundamentally unfair, FRA's ability to promote safety compliance across the board may be damaged.

Even beyond a safe transportation system, however, there is another, perhaps more important issue at stake. Whether correctly or not, a significant segment of our society believes that many forms of drug testing are "just not right." This objection is often expressed as "invasion of privacy" or, in Fourth Amendment terms, an "unreasonable search." This reaction may be profoundly correct, or clearly erroneous, depending on the context in which the issue is posed. Nevertheless, there is no more substantial cost that a nation can pay than the erosion, however gradual, of the social contract. Such erosion is fostered by policies that appear to the average citizen to undermine constitutional values.

The Supreme Court constantly draws a distinction between the wisdom of a law or practice and its constitutionality; a great many of our citizens do not. To many citizens, if it seems like a bad law, or a stupid one, it must or ought to be unconstitutional. Nor do many citizens accept the converse proposition, for even if the government wins the "hard" Fourth Amendment case 6 to 3 in the Supreme Court, the Court's conclusion that a practice is constitutional does not necessarily win the heart and mind of the citizen.

Those of us who may be asked to play the role of opinion leaders and advisors, whether in government, law, business, or labor organizations, can avoid this erosion in at least three ways. First, we can carefully limit the impositions on individuals to those truly necessary to achieve clearly delineated goals.

Second, we can thoroughly educate employee/citizens concerning the respective roles that the Constitution and private contracts play in defining their rights and responsibilities. It is not necessary, by the way, that we all agree in every respect on what those rights and responsibilities are. The fabric of our society will stand a little pulling and tugging; and we have ample means of dispute resolution for the truly litigable cases. But we will find ourselves in great trouble if employees perceive that we really do not care about the rights of the individual.

Third, we can weigh carefully the urgency of drug abuse control against the capacity of non-abusing employees to modify their opinions over time. Ideally, it would never be necessary to test non-abusing employees. But the nature of drugs, like concealed weapons carried onto airplanes, compels over-inclusive screening techniques. Still we must

remember that it is the non-abusing employee who has credibility to complain of perceived intrusions that are, from the perspective of that individual, unnecessary. Gradual implementation of testing, preceded by full discussions concerning the need for the program and the way it will be administered, should help the non-abusing employee understand how the program will benefit that person and will provide reassurance that it poses no threat. Indeed, a successful program depends in large measure on the peer pressure that the non-abusing employees can exert in the workplace on the real targets: the users. The employer or regulator can ill afford to alienate the majority of non-users at the outset.

That it is possible to go wrong has already been amply demonstrated both inside and outside the occupational environment. Those who wish to attack drug abuse for its own sake, or proceed from a misguided, paternal concern for the abuse, or, perhaps worst of all, test to show "who's boss" have already fed the fires of reaction.

CONVERGENCE OF CONSTITUTIONAL VALUES, PUBLIC POLICY, AND PRIVATE CONTRACTS

We must keep in mind both the similarities and the differences between private action and state action. The differences are perhaps more obvious. Any law student knows what most citizens have not learned, or have forgotten: the Federal Constitution protects us as persons against the actions of government. It provides no general protection against the common, everyday demands of our employers, creditors, or other private actors. Such rights as we enjoy against private action are secured by the common law, statutory law, private contract, and occasionally by a state constitution.

As citizens, we need to understand that we can compromise by contract, such as our arrangement with a private sector employer, some of the liberty and some of the "privacy" that are protected from government action by our Constitution. Absent this understanding, discussions of sensitive issues such as drug abuse and drug screening will degenerate into shouting matches about "my constitutional rights."

On the other hand, this distinction can be misleading to the layman by suggesting a great divide that does not really exist. Private contracts are typically construed by arbitrators; and the construction given to an ambiguous agreement will often be informed by the arbitrator's perception of "public policy." That public policy will include both the values underlying the Constitution and the needs of society to ensure public safety and order. Likewise, by actions of legislative bodies or the courts, statutory and common law may also embody protections against private

action that are similar to the protections against federal or state action contained in the Constitution.

There is always a convergence, then, of legal principles that govern the actions of government and private industry. It is in the interest of sound policy to avoid too many hard or unnecessary cases that may make bad law — whether constitutional, statutory, or arbitral.

CRITERIA FOR SUSTAINABLE DRUG TESTING PROGRAMS

Those new to the issue of drug testing ask "can the employer make the employee do that?" or, "is drug testing constitutional?" Although there is no single answer, the benchmarks against which any drug testing program will likely be measured can be identified.

A Hierarchy of Goals

Whether a urine testing program will pass muster depends foremost on the goal it is designed to serve. Possible goals may fit into a hierarchy.

Public safety goals should rank at or near the top. In determining the importance of a public safety goal, one should consider not only the likelihood that safety will be compromised but also the severity of the consequence should it occur. The odds against a nuclear powerplant accident may be extraordinarily high, but Chernobyl teaches us that the odds should not significantly temper the zeal of the regulator or employer to ensure it never happens. The fact that no air traffic controller has yet been shown to have caused a mid-air collision due to drug impairment should not be held to bar the Federal Aviation Administration from instituting a "no drug" policy backed by periodic urinalysis. The unthinkable can indeed occur unless a maximum effort is made to reduce the risk.[3]

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3. The concern expressed by FRA during the course of its rulemaking from 1983 on, culminating in a final rule in 1985, was that the potential for a serious accident involving drugs could become reality absent substantial prophylactic measures. *See* 50 Fed. Reg. 31508, 31525 (Aug. 2, 1985). That concern proved tragically prescient, for on January 4, 1987, less than one year after FRA's rule became effective, 16 persons were killed and 174 injured on an Amtrak Metroliner in Maryland as a result of a collision with a Conrail consist of locomotives. Shortly before the collision, which occurred because the consist ran the railroad equivalent of several "red lights," the Conrail engineer and brakeman had been smoking marijuana in the cab. That accident and others, indeed, have prompted a new round of rulemaking by FRA strengthening the testing provisions and calling for random testing programs for rail operating employees. *See* 53 Fed. Reg. 16640 (May 10, 1988).

National security should also rank high. No nation could or should permit drug abuse to rage unchecked in its military establishment, and it is not accidental that the military services were the first segments of our society to take strong measures to control drug abuse. The same could be said of those public and private entities charged with maintaining our nation's most valuable secrets; the risks portrayed by the story, *The Falcon and the Snowman*, are neither fictional nor fanciful. Further, a combination of safety and security concerns has caused law enforcement agencies at all levels to consider the possible need for drug urinalysis.[4]

Safety of co-workers would also rate a high ranking from most of us. The employer has a responsibility to provide a safe workplace, and the doctrine of assumption of the risk has long ago been laid to rest. Presented with this goal, however, the courts and arbitrators may assign a kind of "discount factor," arising from the fact that the population to be tested is identical with the population at risk. An employee in an industry that already involves inherent hazards may be willing to tolerate a further increment of risk associated with the possibility that co-workers are not 100% fit, rather than agree to be subject to perceived intrusions designed to ensure fitness. This argument, of course, begs the question of the employee's responsibility for the safety of co-workers, but it is nevertheless likely to figure in the calculations of judges and arbitrators.

The hierarchy falls off quickly at this point. *Personal safety* is a laudable goal, but our society permits a wide range of risk-taking by free individuals. The courts will not likely require ordinary citizens to undergo drug testing on the theory that they have a duty to save themselves from drug abuse. By contrast, the drug abuser whose habit has led to serious criminal activity may be required to accept the discipline of a rehabilitation program, including routine urinalysis.

The irony, therefore, is that the *employer's economic interest in fitness* may deserve a higher ranking (if only slightly) than personal safety or health. The employer wishes to avoid costs related to on-the-job injuries, ensure high productivity, reduce medical insurance costs, build public confidence in its products or services, and maintain a good corporate image, ultimately promoting current profitability and positioning the company for future growth. The public at large, to be sure, through the

4. *See Policeman's Ass'n* v. *Township of Washington*, 850 F.2d 133 (3d. Cir. 1988); *Penny* v. *Kennedy*, 846 F.2d 1563 (6th Cir. 1988) (universal urinanalysis of police violates 4th Amendment), *panel decision vacated and rehearing en banc ordered* (Aug. 3, 1988); *National Treasury Employees Union* v. *Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988); *Turner* v. *Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985).

Federal and state governments, may also have a general interest in economic efficiency and avoidance of unnecessary societal costs. But the fact remains that in the context of private contract in a highly competitive industry, the employer's purely economic goal is of much greater importance than would be the case on a constitutional scale of values.

This brief survey of goals illustrates a basic point: decision makers should ask, "Why are we doing this?" at the very inception of any program.

Nexus to Achievement of Goal

Whether drug testing will be sustained under the Constitution or as a matter of private contract will be greatly influenced by the way it serves the chosen goal. If the connection is too attenuated, the intrusion into privacy, however minimal, is easily seen as gratuitous.

A testing program targeted at safety that facilitates immediate removal of an impaired employee from the workplace would appear to be unassailable. But not all programs will involve so obvious a nexus. For instance, prison security may require effective measures to stop the smuggling of drugs to inmates. But random urinalysis designed to determine whether a guard is himself using drugs may be viewed as a highly unlikely way of spotting or deterring the smuggler; and unless the government offers a carefully articulated rationale, a court may condemn that kind of approach out of hand because the nexus is not clear.[5]

Appropriate Conditions

Even with an unassailable goal and a clear nexus, the program may be vulnerable if the conditions under which tests may be required go beyond program need or permit the exercise of unchecked discretion. Here the competing considerations of efficiency, effectiveness, and fairness are most at odds.

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5. *See McDonell* v. *Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987). The trial court had found that logic "far too attenuated" to make random testing of prison guards reasonable under the Fourth Amendment. *Id.*, 612 F.Supp. at 1130. The court of appeals disagreed and modified the lower court's decree on this point, allowing random urinalysis for guards and other employees having day-to-day contact with inmates in medium or maximum security prisons. *Id.*, 809 F.2d at 1308. *But see AFGE* v. *Meese*, 1988 U.S. Dist. Lexis 5635 (N.D. Cal. June 16, 1988) (preliminary injunction granted against random testing of all U.S. Bureau of Prisons personnel; stay pending appeal denied).

Employees typically do not want to be singled out for testing. But nor would they concede the propriety or usefulness of testing except when they are obviously under the influence. No program of drug abuse control could be effective it if took both of these objections literally; but no program will be acceptable that fails to deal with them in some constructive way.

The conditions used to trigger testing will vary in sustainability depending on the context, but it is easy to identify points along the spectrum. Unannounced testing that is triggered solely by the whim of the supervisor is the most susceptible to attack.[6] So-called "random" testing will probably not be found acceptable unless warranted by a compelling goal and accompanied by truly neutral selection criteria imposed by persons other than line supervisors.[7] Not all "blanket" testing, *i.e.*, testing without regard to an event or to individualized determination, is necessarily vulnerable: routine announced testing in connection with physical examinations is easily sustainable as an appropriate auxiliary means to evaluate fitness.[8]

Testing where there is persuasive reason to believe that the particular employee is impaired on the job will almost always be sustained.[9] "Mere" or "unsupported" suspicion, on the other hand, will never be a sufficient basis for testing, since it permits unbridled discretion. In defending the FRA rule, for example, the agency argued successfully that "reasonable suspicion" of drug impairment, resulting from supervisor observation, serves as an appropriate basis upon which a particular employee can be identified for testing.

In the middle of the spectrum, there are a range of circumstances that may warrant testing depending on the context. Few Americans would blink at a requirement that surviving astronauts submit to appropriate testing after every aborted mission, as a part of the extensive investigation that such an event would warrant. Nevertheless, routine testing of survivors has not historically been required after major transportation accidents, which involve much greater consequences to the public at large. The FRA rule takes a step forward in that regard by requiring that surviving railroad employees provide both blood and urine for testing after certain serious train accidents.

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6. *Lovvorn* v. *City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988), *panel decision vacated and rehearing en banc ordered* (Aug. 3, 1988).
7. *Shoemaker* v. *Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986).
8. *See Schmerber* v. *California*, 384 U.S. 757, 771 (1966).
9. *See National Treasury Employees Union* v. *Von Raab*, 816 F.2d 170, 177 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1072 (1988).

Adaquate Safeguards

No urine testing program will pass muster unless it includes reasonable safeguards. Litanies of safeguards can grow like kudzu on the hills of Georgia, but the essentials remain unchanged. Sample collection, identification, and handling ("chain of custody") must be strictly controlled. Any positive result on a screening test must be confirmed by a method specific to the substance detected. The laboratory must have an adequate quality assurance program. The employee must be provided with a copy of the laboratory report. Samples should be retained for a decent interval for retesting, a practice that in turn will help ensure that the need does not arise.

The manner and situs of sample collection is also a key component of any system of safeguards. The supervisor who has ordered a test should never be authorized to observe or participate in urine sample collection, since that would only heighten the anxiety of the employee and exacerbate any perception that the procedure is intrusive. Collection should be accomplished at a medical facility.

Some of most emotional issues arising from urine testing relate to observation of sample collection. Having medical personnel observe collection is desirable to avoid substitution or contamination of the sample. Many employees, particularly many males, will not take offense at this procedure. But insisting on observation over the sincere objection of the donor can only buy trouble, provoking emotional problems and even making it more difficult for the donor to perform. None of this is necessary. For individuals who really do not wish to be observed, measures can be taken that will sharply reduce the possibility of tampering or substitution.

Consequences of a Positive Test

An otherwise sustainable urine testing program may succeed or fail depending on the consequences associated with a positive test result. The first point here is obvious: the policy statement underlying the program must specify what the consequences will be. The employee cannot be left to guess. Nor can the employer apply (or be free to apply) disparate standards to two similarly situated employees. The standards themselves, however, may draw some categorical distinctions.

The nature of the consequences is critical. For instance, the consequences of a positive test done in connection with a medical qualifications program may be mild. If safety is at risk, the employee may be

temporarily disqualified. The basis for the disqualification may be kept confidential, at least the first time. The employee may be permitted to return to duty as soon as the medical department is satisfied that the drug abuse habit has been successfully treated or abated. Some employers may find it worthwhile to provide partial compensation while the employee is out of work, or at least make sure that any treatment costs are adequately covered by the company's health insurance program.

Near the other extreme, if the positive urine test leads to immediate dismissal with no possibility of reinstatement, without any showing that job performance has actually been compromised, the employer will have to offer very substantial arguments addressing the other criteria outlined above in order to sustain the testing requirement.

The Fourth Amendment

The Fourth Amendment[10] constrains public employers and regulators by limiting the conditions under which urinalysis and other body fluid testing may be required. While explication of that Amendment could (and does) occupy volumes, the purpose here is more limited: to suggest that well-constructed urine testing programs should be recognized as "reasonable" under the Fourth Amendment.

Historically, Fourth Amendment law addressed the problems of overzealous action by law enforcement officers vested with general police powers. The courts sought to prevent precisely the kind of arbitrary official action (invasions of the colonists' homes and businesses by British troops carrying "writs of assistance") that led to adoption of the Amendment, and, in addition, to prevent inappropriate deprivations of liberty through arbitrary arrests and detentions. The danger was that the innocent citizen, not the criminal, would be deprived of fundamental rights through official abuses. Thus, the litmus test of reasonableness under the Fourth Amendment was the presence of a valid warrant issued by a neutral magistrate based on traditional probable cause. However, even in the criminal context, the Court found it necessary to carve out major exceptions to the warrant requirement to permit necessary official action, *e.g.*, preventing the flight of a felon.[11]

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10. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

11. *See Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

As technology advanced and government found new ways to discover criminal behavior, the Court sought to preserve the intent of the Fourth Amendment by ruling, in effect, that it protects the individual's reasonable expectation of privacy.[12] This was an important shift, for even as this doctrine extended the reach of the Constitution, it suggested considerable flexibility as well.

Applying the Fourth Amendment to a variety of new fact patterns, the Court has progressively recognized that the categorical responses of traditional, criminal Fourth Amendment law do not provide a satisfactory framework for resolution of a wide range of issues that arise in contemporary society. In recent years, the Court has come (some might say full circle) to recognize that the fundamental requirement of the Fourth Amendment is reasonableness under all the circumstances.[13] The cognizable circumstances include the degree of public need underlying the search and the degree of intrusiveness of the search, considering the psychological, physical, and practical dimensions of the "intrusion."

The maturation of Fourth Amendment law in response to the complexity of contemporary challenges and problems was both summarized and presaged by Justice White in *Delaware* v. *Prouse*, a 1979 decision setting aside a conviction that grew out of a stop of a motor vehicle:

> [T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."[14]

In *Prouse*, the Court found invalid the selective, wholly arbitrary detention of an apparently law abiding motorist. But here, as elsewhere in recent decisions, the Court was forced to acknowledge that the old

12. *Katz* v. *U. S.*, 389 U.S. 347 (1967).
13. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985). *See O'Connor* v. *Ortega*, 107 S. Ct. 1492 (1987).
14. 440 U.S. 648, 654–655 (1979).

criminal case law, which emphasized the essentiality of a warrant based on probable cause, was simply not up to the task of resolving a growing number of issues critical to the delineation of individual freedoms and preservation of the rule of law.

This new perspective has developed slowly and has involved two lines of cases. One line of cases, beginning with *Terry* v. *Ohio*,[15] has fashioned a sliding scale of individualized suspicion short of traditional probable cause. This doctrinal development has been necessary to preserve the concept of criminal probable cause as a usable constraint on arrest and searches specifically designed to uncover criminal evidence, while permitting lesser intrusions that are reasonable on their own terms.

In a quite separate development, the Court has fashioned a doctrine known as "administrative probable cause." This new standard owes its genesis to the Court's decision to overrule *Frank* v. *Maryland* and hold for the first time, in *Camara* v. *Municipal Court* and *See* v. *City of Seattle*, that administrative inspections of both homes and business premises are "searches" within the meaning of the Fourth Amendment.[16] In broadening the reach of the Amendment's protection, the Court was nevertheless faced with the obvious fact that health and safety codes could not possibly be enforced if inspectors had to show criminal probable cause before obtaining admission. In addition, such inspections were seen as limited in scope and devoid of any direct threats to liberty or property, and thus as less intrusive than traditional criminal searches.[17] The line of Supreme Court cases articulating this doctrine has focused primarily on whether warrants are necessary for administrative searches in particular industries, and has excused the requirement where the industry is heavily regulated (or where other exceptions to the warrant requirement apply).[18]

What, then, is "administrative probable cause?" The term denotes the existence of an adequate system, whether statutory or administrative, for controlling the exercise of official discretion. The system must limit any intrusions to those reasonably necessary to achieve a valid public purpose. Administrative probable cause will normally involve the use of

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15. 392 U.S. 1 (1968).

16. *Frank* v. *Maryland*, 359 U.S. 360 (1959); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *City of Seattle*, 387 U.S. 541 (1967).

17. Under certain circumstances, administrative inspectionsmay even be treated as outside the scope of the Fourth Amendment altogether. *See Wyman* v. *James*, 400 U.S. 309 (1971) (welfare home visitation).

18. *Biswell* v. *U.S.*, 406 U.S. 311 (1972) (warrantless search of locked storeroom during business hours under Gun Control Act of 1968); *Colonnade Catering Corp.* v. *U.S.*, 397 U.S. 72 (1970) (search of locked liquor storeroom); *Donovan* v. *Dewey*, 452 U.S. 594 (1981) (warrantless surface mine inspection).

neutral criteria, which among other things provide a degree of assurance that individuals or corporations will not be singled out for "pretext" or "gratuitous" searches.[19]

It was inevitable that these lines of cases would converge, and they have. It was also inevitable that the "neutral criterion" approach of the administrative probable cause standard would be applied to searches and seizures of persons as well as premises. Indeed, although some are loath to admit it, that Rubicon was crossed over a decade ago.

Partially through benign neglect, the Court has effectively approved, by letting stand, the unanimous view of the federal courts of appeals that warrantless searches, without the slightest indicia of individualized suspicion, can be a constitutionally acceptable means of maintaining airport security and public building security.[20] Although many of these cases rely upon a "consent" rationale, their true foundation is administrative probable cause. The message here is that a search of the person by metal detector, and of personal effects by hand and X-ray, is not so intrusive as to be unreasonable if: it deters airplane hijackings and terrorist incidents; no one is surprised; everybody has to do it; and there is none of the stigma and apprehension that usually attends a search for criminal evidence.

In addition, the administrative probable cause approach has been applied by the Supreme Court to detention of individuals in the context of near-border stops designed to identify illegal aliens.[21] The Court has also recently approved searches of selected individuals based on information short of traditional probable cause.[22]

As the Court has eschewed categorical responses to Fourth Amendment issues in favor of a return to the textual touchstone of reasonableness, it has also had to look more closely at context as an element of reasonableness. The Court condemned stomach pumping in *Rochin* v. *California* based on "conduct that shocks the conscience."[23] Over three decades later, however, when the Court refused to authorize surgery to remove

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19. *See Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978).

20. *See, e.g., U.S.* v. *Epperson*, 454 F.2d 769 (4th Cir. 1972), *cert. denied*, 406 U.S. 947 (1972); *U.S.* v. *Bell*, 464 F.2d 667 (2d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972); *U.S.* v. *Davis*, 482 F.2d 893 (9th Cir. 1973); *McMorris* v. *Alioto*, 567 F.2d 897 (9th Cir. 1978) (security search on entry to city courthouse).

21. *U.S.* v. *Martinez-Fuerte*, 428 U.S. 543 (1976).

22. *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985) (search of student's purse); *U.S.* v. *Montoya de Hernandez*, 473 U.S. 531 (1985) (rectal examination of suspected alimentary canal smuggler after 16-hour detention at port of entry).

23. 342 U.S. 165, 172 (1952) (relying on the Due Process Clause of the Fourteenth Amendment).

a bullet of dubious value to the prosecution of an armed robbery case, the opinion emphasized carefully and at length that the Fourth Amendment "balance" simply did not tip in favor of the state, given the unknown risks of surgery.[24]

Drugs and the Fourth Amendment. It is no accident that illicit drugs have played a major role in this recent trend in Fourth Amendment law. Like hijackings and terrorism, illicit drug use and trafficking are an increasingly visible threat to the health, safety, and security of our nation. We are beginning to recognize that drugs pose a palpable threat to the integrity of our basic institutions, and are not merely a personal and private means of "recreation."

The legal scholar might suggest that the prominence of drugs in recent Fourth Amendment law is a matter of accident, but the historian would not likely agree. For instance, it is possible to view *U.S.* v. *Montoya de Hernandez*,[25] which involved alimentary canal smuggling of cocaine, as merely an extension of border search law. But one can also infer that the Court would not have been nearly as interested in the case had the contraband been precious stones. Similarly, *U.S.* v. *Mendenhall*,[26] which involved a strip search at a Detroit airport, could be written off as another "consent" case. But the concurrence in that case, which sought to extend *Terry* to include detention and questioning based on the educated guesses of the drug agents involved, may be quite revealing concerning the lengths to which the Court will go in balancing society's interests against individual rights in illicit drug contexts.

As drug use continues to threaten the mental health of our children, the integrity of our governmental institutions, and the safety of public places and the workplace, the law will continue to evolve. What we see happening is not at all a dilution of the Constitution but rather a more flexible application of its standards to meet contemporary needs.

Body fluid testing. It is to be hoped that Fourth Amendment doctrine is now sufficiently complete to facilitate an orderly review of body fluid testing requirements in occupational settings, but we can expect that the decisions will be somewhat uneven for a time as the lower courts struggle with a new and troublesome problem. As was suggested at the outset, hard cases will produce some bad law. Faced with standardless "ran-

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24. *Winston* v. *Lee*, 470 U.S. 753 (1985).
25. 105 S. Ct. 3304 (1985).
26. 446 U.S. 544 (1980).
27. *Compare McDonell* v. *Hunter*, 612 F. Supp. 1122 (1985) *with Turner* v. *Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985).

dom" testing, some courts will enunciate rigid testing requirements, not always paying deference to possible alternative approaches.[27]

The stream of decisions that has now begun contains interesting jurisprudence and suggests many questions. Consider the case brought in Federal court by a District of Columbia school bus attendant, whose job was assisting handicapped students as they got on and off the bus.[28] Not surprisingly, the plaintiff had an excellent work record and no history of drug abuse. The D.C. Public Schools had required all of its transportation employees to take urine tests in connection with physical examinations. Plaintiff's test was performed by an immunoassay. There was no confirmatory test, but rather only a manual replication of the same immunoassay. This assertedly "positive" test for marijuana led to her dismissal. In opinions that should be required reading for all who are interested in this field, the district court found several faults with this procedure, and the court of appeals reversed only in part. Among them were the requirement that plaintiff be tested in the first place and the failure to do a proper confirmation. In the lower court's view, plaintiff did not hold a sensitive position and should only have been tested on reasonable suspicion (in contrast to a driver, for whom routine urinalysis was deemed appropriate).

In only a partial vindication of the city government's manner of proceeding, the court of appeals reversed in part by holding that when the government can show a *clear* nexus between the evidence that can be gathered from a drug test and a legitimate safety concern, employees like plaintiff who come into direct contact with school children can be tested as part of an annual physical. Fourth Amendment lessons: (1) be prepared to show a nexus between the urine test and the employee's job, or do not require it; and (2) use proper safeguards. *Query:* Would there even have been a lawsuit if the result of a positive test was temporary medical disqualification (with the basis held in confidentiality) until the employee provided a clean sample?

Allen v. *City of Marietta*[29] clearly supports warrantless urine testing of public employees that is based on a high degree of individualized suspicion, even where obtaining a warrant might be possible. In *Allen*, testing was ordered after a paid informant had observed the particular

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28. *Jones* v. *McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), *rev'd in part*, 833 F.2d 335 (D.C. Cir. 1987).

29. 601 F. Supp. 482, 488-492 (N.D. Ga. 1985), *Fourth Amendment portion vacated and reconsidered sub nom. Allen* v. *Marietta Board of Lights and Power, Inc.*, 1987 U.S. Dist. Lexis 13758 (N.D. Ga.) (search justified by reasonable suspicion).

city employees smoke marijuana on the job. *Query:* would the result b different if the employees were office workers, rather than electrica workers?

Shoemaker v. *Handel*[30] also suggests some interesting questions. In that case, the court of appeals upheld random urinalysis and routine breath analysis of jockeys under a state regulatory program, relying upon an administrative probable cause rationale. Successive positives resulted in a warning, a requirement for treatment, and eventually adverse action. The opinion indicates that the pervasiveness of regulation of the horse racing industry was a significant factor in the court's decision. Queries: (1) where on the hierarchy of values should the goals of this program rank *(i.e.*, promote safety of the jockeys, maintain integrity of the horse racing/gambling industry, rehabilitate abusers)? (2) would the result have been the same if the program had not included a requirement of qualified confidentiality? (3) in a high-visibility sport, is a confidentiality requirement likely to protect the participant who tests positive?

The Supreme Court has not yet spoken on the matter of occupational drug testing, but it should before the October Term 1988 is out.[31] The Court, it is submitted, will apply the same "reasonableness" standard that underlies both the "individualized suspicion" and "administrative probable cause" cases already decided.

The obvious danger is that individual Federal court decisions, whether at the district, circuit or Supreme Court level, will be taken to answer the categorical question: is occupational drug testing legal? But the foregoing discussion of Fourth Amendment considerations makes clear that no single answer exists.

A DIGRESSION ON THE FIFTH AMENDMENT AND THE BURDEN OF PROOF

Employee representatives sometimes complain that body fluid testing is a violation of the Fifth Amendment right against self-incrimination, even though that issue was long ago decided to the contrary.[32] Employee representatives also refer to a "right," no doubt borrowed from principles of criminal law, to be presumed innocent until proven guilty. These ideas, which certainly strike a responsive chord in even the hardened advocate, are melded into an emotive claim that the employer has no right to exact from the employee's body the evidence by which the

30. 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986).
31. *See* nn. 2 and 4 *supra*.
32. *Schmerber* v. *California*, 384 U.S. 757, 765 (1966).

employee may be disciplined. Alternately, the argument is that the employer should bear the threshold burden of "proof" to show that a body fluid test is warranted.

This understandable claim is wrongheaded nonetheless. It has long been recognized that the state or an employer may require the citizen or employee to make an affirmative proof of fitness to undertake a task that affects the health or safety of others. All of us must pass written tests and eye examinations in order to obtain driving permits. We must also affirm that we are free of disabling conditions; and some states require private physicians to report such conditions. Since 1927, the Federal Aviation Administration has mandated extensive physical examinations of all pilots; and similar examinations are required in a variety of public and private contexts today. Where the context is appropriate, routine urinalysis undertaken as part of a reasonable medical examination procedure should be no more objectionable; and urinalysis designed to uncover the basis of serious, documented performance failures should be equally unimpeachable.

CONCLUSION

A host of drug urinalysis cases has already come to the judicial branch, and arbitrators are facing a similar deluge. In general, urinalysis programs will stand or fall depending on their proportionality to the problem addressed and the care with which they are executed.

It is now commonplace for employers and regulators to recognize the dangers posed by drug abuse in the workplace. If we are to avoid serious error and inappropriate reactions from the judicial system, it should become equally commonplace for employers and regulators to apply appropriate criteria to the design of drug abuse programs. Drug abuse programs should inform the expectations of employees, rather than challenging them head on. Recognition of constitutional values should play an important role in program design, even under private contracts. At the same time, all parties to the ensuing dialogue should appreciate the durability of our Constitution in meeting the needs of the present.

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CIVIL LIBERTIES AND ETHICAL CONCERNS

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The American Civil Liberties Union (ACLU) is often accused of being out of step with the views of the American public. The assertion is that the ACLU's interpretation of the Constitution and civil liberties is too formal and legalistic and ignores the general public's policy objectives. But the Constitution, particularly the Bill of Rights, was enacted to maintain and guarantee certain basic values in society. These basic values were to be maintained notwithstanding societal changes resulting from advances in technology and knowledge. Although the Bill of Rights does not apply with the full force of law to the private sector, there are extremely strong moral and ethical imperatives to apply the values embodied in the Bill of Rights to private employment relations. The private sector quite understandably can be expected to do what the law allows. However, with regard to preserving individual rights of privacy, particularly in the case of drug testing, there is disagreement about what intrusions on individual privacy the law *should* allow, either by the Government or by private employers.

For the past several years, the ACLU has actively dealt with the polygraph issue. To some extent, this issue and the drug testing issue are similar. Both represent efforts to utilize highly intrusive technology in the personnel screening process in order to achieve specific desirable goals. Polygraphy aims to establish the trustworthiness of job applicants, as well as the truthfulness of employees who are on the job when evidence of workplace theft arises. Drug testing aims at dealing with a national problem—the abuse of controlled substances— that can have serious adverse effects in the workplace. There is no argument that abuse of controlled substances in the private sector has threatened employee health and reduced productivity and profits. But the validity of polygraph testing has yet to be proven, and for urinalysis drug tests the questions remain: (1) will drug testing attain its goal of reducing substance abuse in the workplace? and (2) is the technology reliable enough to provide accurate results? The ACLU believes that private employers must carefully examine these issues when considering the

1. The author was Legislative Counsel for the American Civil Liberties Union at the time this paper was written.

appropriate circumstances and justifications for intruding upon individual privacy.

The notion of individual privacy, as embodied in the Fourth Amendment to the Constitution, is not vague. The Fourth Amendment directly applies to the drug testing issue when it guarantees that "the right of the people to be secure in their persons against unreasonable searches and seizures shall not be violated but upon probable cause." Individuals in American society have been recognized under this proscription to have a reasonable expectation of privacy with regard to their bodily fluids. In a 1966 case, *Schmerber* v. *California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) dealing with blood tests, the Supreme Court stated that the Fourth Amendment protects an individual's expectation of privacy with respect to his or her bodily fluids. In every court case dealing with government-mandated drug testing compulsory urinalysis, like compulsory blood testing, has been held to constitute a search of the individual within the meaning of the Fourth Amendment.

The Supreme Court held in *Schmerber* that the Fourth Amendment does not prohibit all intrusions based on reasonable expectations of privacy; rather, it prohibits intrusions not justified by the circumstances or made in an unreasonable manner. In other words, the Fourth Amendment doctrine is determined by: (1) balancing the competing interests of the individual's right to privacy with the interests of the government or private employer; and (2) evaluating the public or private employer's justification for intruding on an individual's privacy based on probable cause, the degree of intrusion, and the manner in which the search is conducted.

Numerous questions surround the implementation of drug testing in the workplace. Who is targeted for drug testing? For what drugs should testing be done? Is the test methodology reasonable, reliable, and accurate for the tested drug? Can the test provide evidence of intoxication at the time the test is taken? What will be the consequences of the testing? Positive results may affect reputations as well as employment status. The courts have held that there is no self-incrimination issue involved in drug testing because it is not testimonial in nature. Yet, when an employee tests positive in a drug test, he or she is effectively labeled a "drug stet." That raises another important question—is a drug user necessarily a drug abuser? Why do certain kinds of drugs merit this kind of draconian intrusion on the right of individuals' privacy? It certainly would not be tolerated in the case of alcohol.

There are important lessons to be learned in this area from the country's experience with prohibition. The President's Organized Crime Commission endorsed the concept that drug testing be widely used in Federal

Government and in the private sector. The Commission found that law enforcement efforts to interdict drug importation have been largely unsuccessful, despite enormous expenditures of time and money. Drugs continue to flow. At the same time, government programs to educate the public about the dangers and consequences of drug use have been largely unsuccessful. The Government may have lost some educational credibility years ago when it adopted a "domino theory" that marijuana use leads inexorably to use of more dangerous drugs.

The Commission concluded that the Government could not stop access to drugs or convince people that it is in their best interests to end recreational drug use; therefore, the only way to deal with the problem is to identify the individuals who use these drugs so that they may be punished and thereby serve as examples to deter use by others. The Commission evidently believed that, notwithstanding the expectation of privacy, it is reasonable to conduct bodily searches by urine drug testing. Thus, testing in this setting is assertedly justified on the basis of the illegality of drug use. However, if this logic is accepted, would it be farfetched to suggest next that people's homes, offices, briefcases, and persons be subject to search for controlled substances? That, after all, would be the logical extension of the argument.

The ACLU's main problem with mandatory workplace drug testing is that it is not, in most instances, based upon observed behavior or impairment of job performance leading to a reasonable suspicion of drug use. Even if it were, the limited probative and predictive value of a "positive" test result makes any claim to legitimate workplace justification for testing dubious at best. Moreover, as drug testing becomes more widely accepted and adopted, businesses may become tempted to use cheaper, more expedient means of conducting testing. This may result in less exact methods and standards of testing which will only exacerbate the unfairness inherent in testing that cannot distinguish whether or not an individual has used drugs on his own time or on company time or whether an employee is impaired while on company time? What is the use of a program that cannot make the above distinctions? Will such drug testing and the threat of adverse employment sanctions induce a massive movement away from recreational drug use? Criminal sanctions certainly have not done that.

Furthermore, if the criterion of impaired job performance is the basis for testing, why test for only illegal drugs? Why not alcohol? Why just drugs and alcohol? Why not conduct an inquiry into an individual's domestic affairs generally to determine whether someone is otherwise engaging in morally unacceptable and possibly illegal behavior or activities? There is an endless variety of lifestyle activities which can result in

workplace inattentiveness or otherwise could cause impaired job performance. Where is the line drawn?

Everyone can agree, based on the Fourth Amendment and basic principles of fairness, that the Federal Government and other employers should be required to establish adequate safeguards to protect the rights of individuals undergoing workplace drug testing. Is it realistic to believe that drug testing can be conducted on as large a scale as is anticipated and still maintain those safeguards? The ACLU believes that budgetary considerations will pre-empt adoption of adequate standards and procedures for safeguarding rights of privacy and confidentiality. As records custodian, is an employer prepared to take on the responsibility of maintaining and ensuring the confidentiality of information gained through drug testing? Indeed, in utilizing drug testing, will employers be prepared to take responsibility for a host of thorny legal and ethical issues engendered by the practice? These questions must be considered and resolved *before* such testing is embraced to become a routine intrusion upon significant rights and values.

Interestingly, the Federal Government wears two hats: (1) it is an employer, and (2) it is chief investigator, law enforcement officer, and prosecutor of criminal laws. Thus, when the Federal Government conducts employee drug testing, does it ignore "positive drug" testing results insofar as criminal prosecution is concerned? What is the employer's responsibility with respect to potential criminal liability resulting from a "positive" drug test? Must that information be given to a law enforcement agency that may subsequently investigate that employee?

Once an employee has tested positive for a controlled drug, what responsibility does the employer have to ensure the accuracy and confidentiality of test results? The confidentiality procedures necessary in such a case are complicated and implementing them would be an administrative nightmare for most companies. Is an employer even capable of controlling access to information once it filters through company information channels?

Finally, what is the goal of drug testing? Should drug-using workers be kept on the job and rehabilitated? Or should they be temporarily dismissed or permanently discharged? These questions, unfortunately, are not typically considered in the rush to address the national problem of drug abuse through testing in the workplace.

These three factors—(1) the Fourth Amendment's doctrine about what constitutes a reasonable expectation of privacy, (2) the inaccuracy and limited probative value of current and likely-to-be-continued methodolo-

gies, and (3) the intrusiveness on the individual—lead the ACLU to conclude that drug testing in the workplace is not reasonable. Increased reliance on indiscriminate drug testing in the workplace, like expanded use of the polygraph, marks an alarming step backwards from two decades of evolutionary progress in recognizing and protecting privacy rights, particularly in the employment context.

Drug testing in the workplace is rationalized by the employers' need to protect their enterprises from the national drug problem and its effect on job performance. Most drug testing programs in the public and private sectors require prospective and present employees to be tested without any reasonable suspicion of drug use. A positive test authorizes the denial or loss of employment whether or not the individual's job performance is at issue. Drug testing becomes routine, when there is no suspicion of drug use, or any compelling justification for testing based on the inherent danger or sensitivity of the work. These tests subject individuals to unwarranted invasions of personal privacy in violation of Constitutional protections against unreasonable searches and seizures. Moreover, the dubious reliability and evidentiary value of the test methodology most widely used (immunoassay urinalysis) detracts further from the "reasonableness" required by the Fourth Amendment.

The Bill of Rights does not generally apply with the force of law to nongovernmental action. However, moral and ethical considerations argue for application of elemental fairness and respect for the individual in private employment relations. With those embodied values in mind, the following areas need to be developed: (1) criteria for selecting individuals and fields of employment for testing; (2) the nature and methodology of the test; and (3) the safeguards necessary to protect the rights of privacy, property, and liberty of those tested.

Even if we do develop drug testing that is cheap, expedient, accurate, and reliable, do we really want to be guided by technological capability alone? Only by considering the transcendent societal values of the Bill of Rights can we achieve the legitimate aim we have set for ourselves as Americans. Otherwise, even if there is some chance that drug testing could help achieve its aim, the resulting price we pay as individuals and as a collective society is too great.

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Section 3

Human Relations Concerns

EMPLOYEE RELATIONS ASPECTS OF DRUG ABUSE

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Shoptime drinking, which had been traditional, began to increase. . . from the customary 11 a.m. refreshener and afternoon break to a long list of celebrations: the shop must drink when a new man arrived, or an old one departed. . . And on payday the workmen were compensated in a tavern or bar, where they were encouraged to spend their earnings.[1]

INTRODUCTION

Compared to the above portrait of the early 19th century American workplace, today's plants and offices have made remarkable progress. Flagrant insobriety is no longer acceptable on the shopfloor. But in another respect, the condition of the work force has seriously deteriorated. For, in recent decades, a vast array of impairing chemicals in addition to alcohol have found their way into our streets, our homes, and our places of business.

The modern chemical gourmet frequents a veritable "drug delicatessen." The shelves are lined not only with illegal drugs, such as cocaine and marijuana, but also with widely abused prescription drugs, like tranquilizers and amphetamines, and even over-the-counter medicines. According to medical experts, much of the population comes to work each morning suffering the lingering effects of sleeping pills and cold remedies.

Ours is a drug-loving culture in which high dosage has high appeal. If "one thousand milligrams strong" can become an effective marketing

1. Rorabaugh, W. J., *The Alcoholic Republic*, 1979, New York, Oxford University Press, p 132.

slogan (presumably because it sounds more potent than a mere gram), we should not be terribly surprised to find that employees have been indulging themselves to the point of eroding productivity, increasing the risk of accident, inflating medical expenses, and compounding sick time.

The cost of chemical abuse to industry is difficult to calculate precisely, in part because not all the consequences are easily measurable in dollars. Yet, in many enterprises, it has been deemed good business (for obvious practical reasons) to deal directly with chemical impairment among employees. This may entail simple steps, such as serving nonalcoholic punch at the office Christmas party or forbidding lunchtime drinking by executives. Although some breweries cling to the traditional beer break, others have converted the benefit into a six-pack to take home. A number of employers, however, have gone much further than that; they have launched elaborate, comprehensive campaigns against all forms of chemical abuse.

The approaches taken are strikingly varied. Some employers treat chemical impairment primarily as a disciplinary issue, and they rely upon such deterrent measures as random urine screens, sniffing dogs, locker searches, and undercover agents. Other employers emphasize therapeutic goals—identifying and treating those with a chemical dependency disorder. Reliance is placed upon supervisors trained to recognize (but not excuse) impaired performance, upon counselors, and upon employee assistance programs.

THE DISCIPLINARY APPROACH

Some of the disciplinary approaches to chemical abuse raise troublesome issues. To what extent should an employer, in the name of industrial security, intrude upon an employee's personal privacy? Even when accurate (not always a safe assumption), testing is invasive and often reveals more about the employee's off-duty lifestyle than his current impairment on the job. Few employers would consider it their province to insist on knowing whether employees drink alcohol on the weekend.

Some workers are already subjected to polygraph examination, psychological testing, fingerprint checks, and Acqui d Immune Deficiency Syndrome (AIDS) screens. Screening for genetic susceptibility to industrial chemicals is on the horizon. Adding routine urine screening may contribute to surveillance overload. The typical employee could, as a sportswriter recently remarked of professional athletes, come to "live in fear of a flying visit from the vial squad." Whether the work force can be kept efficient and highly motivated by a steady flow of reports from laboratories and undercover agents is at best debatable.

The disciplinary approach also tends to focus narrowly on illegal drugs, rather than on the broad spectrum of potentially impairing substances, including alcohol and prescription or over-the-counter medicines. But illegality should not necessarily be the most critical issue for employers, who, ironically, often seek to avoid having law enforcement responsibilities pressed upon them by government. A balanced employer policy recognizes that management's primary obligation is to ensure a productive, safe workplace; licit substances may be a more potent threat to that objective than illegal substances. Some employers are now making an effort to regulate the use of prescription drugs on the job, requiring supervisors to be notified when a worker is taking medicine under a doctor's direction. Similarly, industry practices which may actually encourage the abuse of prescription drugs, such as amphetamines, steroids, and painkillers, are coming under scrutiny.

THE THERAPEUTIC APPROACH

The therapeutic approach is also not without problems. Treatment is typically an open-ended process, and it is difficult for an employer to know when the chemical abuser has been given a sufficient chance to break through the initial denial phase and to demonstrate progress toward recovery. Health benefit plans which provide for chemical dependency treatment are still in an embryonic stage. The challenge is to provide enough flexibility to meet individual treatment needs—for example, by allowing a choice between inpatient and outpatient care—while rigorously controlling cost and monitoring quality. An entire service industry of treatment providers has sprung up, and the various facilities and styles of treatment need to be evaluated.

UNION EFFORTS

One encouraging development is the proliferation of prevention, counseling, and assistance programs sponsored or cosponsored by unions. Union-spearheaded efforts, like Operation Red Block on the railroads, emphasize the right of employees to refuse to endanger themselves by working alongside the chemically impaired. Peer pressure is being harnessed for the constructive purpose of identifying chemical abusers rather than covering up for them. Because the abuser is presented with an opportunity for treatment, not an immediate discharge notice, the sponsors believe that the critical goal of keeping the unsafe off the job can be accomplished with the cooperation of fellow workers.

POLICIES ON CHEMICAL ABUSE

Another promising development is the art..ulation, in employee handbooks and labor-management agreements, of policies on chemical abuse, specifying not only penalties but opportunities for recovery. Even drug testing can be incorporated in an agreement, as the trucking industry has demonstrated, precluding later disputes about proper procedures and standards. Such formal policies ensure that employees understand the significance of on-the-job impairment, and they evince a commitment to placing the question squarely on the industrial agenda. Clearly, this is still an age of experimentation, groping for effective methods to counter chemical abuse. But just as clearly, a sign has been given that there is a new determination in the American workplace to find an answer.

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THE ROLE OF EMPLOYEE ASSISTANCE PROGRAMS

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BACKGROUND

Employee Assistance Programs (EAPs) have emerged as a forum through which companies may address the problem of drug abuse detection. Where they exist, EAPs are a natural resource for employers who desire to tackle the problem of drug abuse in the workplace. The programs were originally set up to counsel employees with alcoholism and its related behavioral problems, which makes EAPs a viable option as a tool in the solution of the drug abuse problem.

EAPs can reach employees through a variety of methods, including education, policy development, and management training. Publicity and educational outreach programs in the workplace can provide needed information for employees about drugs, their effects, and sources of help. EAPs can assist corporate personnel in promulgating a clear policy regarding drug abuse among employees. In the job performance model, EAPs work with managers and supervisors to reach drug-abusing employees. Managers are trained to confront employees when appropriate and refer employees to the EAP for professional help. Once the employee arrives at the EAP unit, trained clinicians can identify and diagnose drug-abusing employees and refer them to community resources for appropriate treatment. The initial interview involves use of approprite interview skills (e.g., confrontation techniques) and well-designed drug screening forms. Taking a drug history can be a most helpful tool in locating employees who come to the EAP presenting another problem that may be a screen for an addiction.

EAPs also contribute to corporate short- and long-range planning. The EAP can help define the drug abuse problem for industry by maintaining accurate records for data collection and follow-up evaluation of the population served.

In the author's opinion, EAPs provide a positive alternative to reaching employees with drug problems. The Rehabilitation Act of 1973 is of critical importance here. It defined an alcohol- or drug-addicted employee as handicapped; this means that even when a drug abuser is identified, counseling needs to be offered before an adverse action is started. In the Federal sector, the EAP has been seen as reasonable accommodation for this law.

Some general concerns and trends need to be addressed to understand the appropriate role of EAPs:

- Alcohol remains the primary drug of abuse in the workplace.
- The problem is one of polydrug abuse (i.e., employees taking a mixture of substances which include legal drugs and alcohol with illegal substances).
- EAPs also have a role with employees who do not have a drug problem themselves, but are living with a family member with a drug problem.
- Family members of employees with drug problems may also seek out the EAP for help in dealing with the troubled employees.

With these points as a background, it is appropriate to look at the future direction of EAPs and how they can relate to drug abuse in the workplace.

INCREASED EMPHASIS ON DRUG ABUSE

There has been a tremendous increase in the use and abuse of drugs not only privately, but in the workplace as well. Companies have tried to control the problem through drug screening in pre-employment physicals, random urinalysis of all employees, and establishment of drug testing related to fitness for duty policies. Employee assistance staff need to be knowledgeable in the areas of security questions, public safety, and legal issues around drug screening. EAPs should not be the enforcers of antidrug policies and procedures but need to work in conjunction with medical departments and security officers for the control of legal and illegal drug abuse in the workplace. In addition, EAPs can be the first referral point for employees with positive drug screens.

EAPs traditionally have been confined to giving information and referring employees to appropriate community resources for further treatment. Many EAPs are now able to also offer short- term counseling (eight sessions or less), as they have added professional staff with treatment capabilities. Consequently, EAPs have less need to refer clients out, serving to reduce health insurance costs to companies. More importantly, by assuring that their EAP staff has appropriate credentialing in addiction, companies can rehabilitate employees within their own structure at much less cost.

EAPs are beginning to serve as controls for usage of mental health benefits. Some companies have begun to request that the employee be seen by the EAP for a second opinion, prior to approval of a lengthy inpatient hospitalization or long-term outpatient therapy sessions. EAPs may end up having ultimate responsibility for planning and monitoring the entire mental health package offered by the company to their employees. This has a significant implication for treatment of addictions, because people often present different problems than those eventually diagnosed as the problem. The more skilled the counselor is in detecting addiction, the sooner employees will be helped and returned to work.

CONCLUSION

In conclusion, it is important to realize that the EAP framework can be modified to respond effectively to employee drug abuse. For any abuser, the underlying goal of an EAP is to get rid of the problem and not the employee. Moreover, the emphasis is on rehabilitative and not punitive measures, which serves as a safeguard of employee rights to dignity, privacy, and confidentiality. With help from an EAP, employees with drug dependency problems receive education and treatment instead of mandatory penalties or sanctions imposed by law enforcement officials.

Crowley-Maritime Corporation, a California marine transport firm, implemented a drug inspection program in conjunction with its EAP to respond to escalating drug-related performance deficiencies. With the cooperation of the company EAP and personnel department, the management established an effective policy that delineated drug abuse inspection procedures and education and treatment alternatives for drug abusing employees. Guenther Nuernberger, Crowley-Maritime's EAP manager, states:

"The vast majority of employees welcome the participation of the EAP because they see it as a guarantee that we will adhere to policy. Although not the definitive response to employee drug use, the company EAP is relatively free from being associated with the legal and ethical controversies of drug testing in the workplace."[1]

EAPs are, in the end, a valuable resource for company drug abuse detection efforts. EAPs may play a legitimate role in clarifying procedural grounds, since they can assist in developing and implementing the company drug detection policy. On substantive grounds, EAPs can promote a strong treatment and education approach to drug abuse in the workplace and provide an incentive for employees to redress their dependency.

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1. How One Shipping Company is Keeping Drug Abuse at Bay, *ALMACAN*, June 1985, Vol. 15, No. 6, pp. 18-20.

DRUG ABUSE AND SMALL BUSINESS

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INTRODUCTION

The cost of drug abuse among employees has been well-documented. The millions of people that are directly and indirectly affected by drug abuse and the billions of dollars in costs to employees, employers, and society at large underscore the enormous price we all pay for this disease.

In 1986, national attention was drawn to drug abuse by (1) the penalties imposed on several notable players by major league baseball and (2) the report of the President's Commission on Organized Crime. Among other recommendations, the Commission's report called for drug testing of all Federal employees and of employees of firms holding contracts with the Federal Government.

The Commission's findings are an indication of the frustration—some might even say futility—of trying to combat the most profitable illegal enterprise in the world, a business which has its best market in this country.

The Commission seemed to be saying that if we cannot stop the suppliers, then we should focus on the user population and require private and public employers to identify such individuals.

These two developments, baseball's penalties and the Commission's report, point up the timeliness and importance of providing guidance to American employers on drug testing of employees. Such guidance can ensure that the rights and responsibilities of labor and management are fully accommodated.

DRUG ABUSE'S BIG EFFECT ON SMALL BUSINESS

Although the cost of drug abuse is significant to large companies, in many ways the cost to the smaller firm is proportionately greater than to larger firms.

Consider the effect one drug abusing employee could have on a small production team of 10 to 20 coworkers. Such an employee could bring the operation of a small firm to a virtual standstill, indeed, put the company out of business. If this seems somewhat dramatic, bear in mind the following:

- A drug-abusing employee who is responsible for the quality of a product while operating under diminished capacity could cause a small firm to lose a contract; that contract may represent the lion's share of the firm's revenue.

- Short of this development, also consider the effect that a malingering employee who is reacting to drug usage could have on the morale and, subsequently, the productivity of other workers.

- Finally, consider the insidious consequences of an employee of a small firm who is supplying other workers with drugs, to the point that the majority of the work force could be operating under the influence of drugs.

- It is no wonder then that the response of small employers to drug problems ranges from immediate firing, to personal intervention to help the drug-abusing employee through his affliction.

These responses could change dramatically, given the Supreme Court's ruling in 1985 that upholds the States' power to require private health insurance companies to provide certain benefits. Most small companies that do offer health insurance are not self-insured (which would exempt them from the Court's ruling under ERISA); thus, these companies have to offer State-mandated benefits. In 1986, some 40 States required some form of drug abuse coverage in private health insurance plans.

Finally, small business response to drug abuse may also be shaped by the extent to which companies offer health insurance to their employees. The table below shows that pattern of coverage in 1985:

Size of Business (No. of Employees)	Percent of Employees Provided with Insurance
1 - 24	36%
25 - 99	65%
100 - 499	77%
500 or more	86%

WHAT SMALL BUSINESSES CAN DO ABOUT DRUG ABUSE: ALTERNATIVES TO IN-HOUSE PROGRAMS[1]

Smaller firms normally do not have the resources to provide a comprehensive response to drug abuse. For this reason, the company may wish to designate a company official to be primarily responsible for coordinating identification and outreach activities and for referring employees to appropriate community resources. The scope of the company's in-house services (and the official's responsibilities) can take at least two quite different forms:

- The designated company official refers the employee to an outside agency, such as an employee assistance program, for diagnosis and referral services. The agency is responsible for discovering whether the employee has a drug abuse problem. If the company desires, the agency also can recommend referral to specific treatment programs.
  - The company can contract with an outside agency for such services or work with an agency on a case-by-case basis.
  - The company official is responsible for identifying resource agencies, establishing procedures with the agency, and referring the employee. The State drug abuse and alcoholism agency(s) can provide information on whether such agencies exist in the company's area and the type of services offered.
- The designated company official observes the employee, makes an initial assessment of substance abuse, and then refers the employee directly to a drug abuse treatment resource.

Both approaches require that the designated company official have or develop a basic knowledge of drug abuse treatment alternatives and awareness of community treatment and support resources. The second approach requires skills in recognizing drug abuse treatment problems.

Another alternative is to form a consortium of small businesses. Depending upon the type of commitment companies are willing to make, the consortium can deal with specific drug abuse problems, more general substance abuse problems, or troubled employees in the broadest sense.

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1. Recommendations in this section are based on *Developing an Occupational Drug Abuse Program*, published by the National Institute on Drug Abuse.

To address employee-specific problems, the consortium can be set up to provide basic diagnostic and referral services, drug abuse counseling, and/or counseling services consistent with the broader employee assistance program approach.

This consortium would operate best as an independent, though jointly financed, facility with the main purpose of providing services for member companies. Each member company retains responsibility for establishing identification and outreach procedures and for referring employees to the consortium-based program staff.

The chambers of commerce in Taunton, Massachusetts, and Aspen, Colorado, are two examples of collective action. To a similar extent, many of the more than 150 business and health coalitions could serve as a source of drug abuse services for their small business members.

Of course, an even greater challenge is presented to the smaller firm that is located in an area where there are few or no community resources to deal with drug abuse. These areas include small towns in rural environments. The absence of such community programs may suggest to some that the community has only a minor drug problem; however, companies should not assume that this is the case.

- One solution to this problem is for one or more companies to encourage local private and public health officials to establish a drug abuse program. The company(s) then can refer employees and their dependents to the program.

- A variation of this approach is to combine the community-based program with one established through a consortium of businesses. The types of services provided will depend on local needs. The consortium might hire a trained drug abuse counselor on a full-time basis and possibly contract with a local physician or psychiatrist for their services, as needed. If local drug abuse problems involve physically addictive drugs, it is advisable to work in conjunction with a nearby hospital to develop detoxification and inpatient care.

- Still another source of assistance are the many (toll free) hotlines that provide callers with advice and information on the nearest source of professional help.

These are some of the ways small businesses are dealing or can deal with drug abuse in the workplace. In addition, businesses can conduct drug testing of employees, if they decide to pursue this strategy or if required to by law.

U.S. CHAMBER OF COMMERCE

For its part, the U.S. Chamber of Commerce has gone on record as supporting a drug-free environment, starting with the workplace. In 1985 and 1986, Chamber President Richard Lesher prepared a series of public service announcements (PSAs) for radio and television. The National Association of Broadcasters took lead responsibility for distributing the PSAs shown nationally over the major broadcast networks, including the Chamber's own American Business Network.

SUMMARY

American businesses of all sizes recognize that they have a right and a responsibility to create and maintain a safe and healthy workplace. Employees are expected to perform in their best mental and physical condition. Employees whose performances are impaired by drug use pose an economic and physical threat to other workers and (depending on the nature of the business) to the employer's customers and to the population at large.

A drug-abusing employee can have a proportionately greater negative impact on the smaller employer than on larger firms. At the same time, such an employee may be more easily identified in a small company. Thus, a small employer may be able to help the employee seek treatment without having to deal with the issue of testing. When testing is necessary, the small employer can use the community-based and/or consortium-type services, which are available to firms and organizations with limited resources.

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DEVELOPMENT OF A SUBSTANCE ABUSE POLICY: CONSTITUTIONAL AND OTHER LEGAL CONSIDERATIONS

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UAW/Ford Employee Assistance Program

The Executive Board of the United Auto Workers Union has adopted a comprehensive substance abuse policy. The policy opposes drug testing and supports a broad range of Employee Assistance Programs aimed at "encouraging early and comprehensive treatment directed towards rehabilitation."

The issues of drug abuse and drug testing obviously are very crucial in the labor movement. They create a tremendous dilemma: If some union members have problems with drugs, and the union has a responsibility to help, what is the best way to help? Essentially, the search for ways to combat drug abuse in the workplace has led to drug testing and punitive measures that directly conflict with fundamental union principles of helping members.

THE CONFLICT: HELPING VS. PUNISHING

The only reason people organize into a union is to help each other. This gives a labor union a responsibility to help a member, or one of their family, if they have a problem.

A union—in fact, the labor movement itself—is concerned with more than just its own members; it is concerned that society has a serious drug problem. Therefore, there is a responsibility to help with society's problems. Union members live in this society, which means that, if some members of society have a problem, then union members will also have a problem.

The UAW rejects the philosophy advocated by some that drug testing and punitive measures are the answer to the substance abuse problems in the work setting. It simply is not that easy. In fact, it raises some questions that must be addressed:

- How do we know when we have a drug problem?
- What is a drug-free environment? Aspirin is a drug; coffee is a drug; and alcohol is a drug.
- Who should decide what drugs we are going to screen?
- Who should decide what people are not supposed to do at home?
- Is drug screening legal?
- Who regulates drug screen testing firms?
- Why are there so many false positive readings?
- How do you protect fourth amendment rights?
- How do we prevent an invasion of privacy?

A lot needs to be done to identify the kinds of problems needing work.

THE CHALLENGE: FINDING THE BEST WAY TO HELP

It is clear that society's drug problems are not going to be cured in the industrial setting. Yet, a good program in the workplace can help society with the battle. Such a program adheres to the basic principles that guarantee:

- The right of every worker to privacy
- Evaluations based on job performance
- Presumption of innocence
- The right to treatment for illness through Employee Assistance Programs and benefit packages

Past experience has taught us much about how to structure effective workplace programs. Eleven or twelve years ago, work began on the alcoholism problem. Many wanted breatholizers at the plant gates—exactly the same thing we are going through today with drug testing. Breatholizers at the gates did not work and drug screening will not work. Let us remember that Employee Assistance Programs survived those times. Some good programs that are helping people were developed by unions working together with management.

Three guidelines will help unions and management develop programs rooted in the basic principles listed above:

A Focus On The Individual

We should look at this from the human being's standpoint— not the company's, not the union's—but as an individual going into any workplace. The Constitution provides the opportunity to be presumed innocent. However, some companies are pulling people off the line and saying, "We want a urine sample." That is a presumption of guilt.

The labor movement does not in any way condone drug usage; but simply identifying people as drug users, firing them, and then throwing them back into society is counterproductive. The problem remains, and the cost burden simply shifts. The company payroll is no longer paying for the abuser; instead,taxpayers are. A focus on the individual, and on doing only those things that will help people, will help the workplace become an environment free of problems.

A Focus On Job Performance

For many years, we have developed Employee Assistance Programs, which train supervisors and union representatives to identify people with drug problems based on their job performance deterioration. People are hired to perform. They should not be judged based on weekend or after-hour activities, drinking beer or smoking marijuana on Saturday night. They are hired to do work. The concern should be whether the person is capable of doing that work. Why should we ever take a blood sample from a person who is not having problems? The focus should be on performance; hopefully, if an individual has a performance problem he or she will say: "I have a problem, help me."

A Focus on The Intent of Employee Assistance Programs

Do not contaminate Employee Assistance Programs with drug screens; the programs will lose their credibility. The Employee Assistance Program is a place for identifying whether or not a person is using drugs. An Employee Assistance Program should be used as an instrument to help individuals rather than as an attempt to clear an organization of drug abusers. The focus on

helping is the right thing to do, and statistics show that you will have just as many drug abusers with the replacements.

Surely we are not going to take care of our problems with drug screening. We should look to the past where we have had good experience and some good programs, within the context of the Collective Bargaining Agreement. This experience will show us how to identify problems without becoming *hysterical*.

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HUMAN RELATIONS ASPECTS OF DRUG ABUSE IN THE WORKPLACE

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INTRODUCTION

Drug abuse in the workplace is a growing problem in our industries. Resolving the many controversial issues the problem raises requires an interdisciplinary approach to the problem.

The detrimental effects of drug abuse, especially on the job, are indisputable. A central controversy, however, is whether drug testing is the pat answer to solving the problem. This and the other papers in this document will explore the complex issues presented by drug screening in the workplace. It will be particularly encouraging if, as a result of this discussion of issues, even one of us becomes more humane and recognizes that questions of drug screening and human relations must be considered together. Thus, if drug screening becomes necessary, an interdisciplinary approach to consequences of a positive result must be applied.

Every prudent organization, including labor, agrees that companies should have rules, regulations, or policies dealing with drug abuse in the workplace. All parties agree that disciplinary procedures for violating the rules are needed. But, establishing degrees of discipline entails proper weighing of all facts and issues. If discipline leads to punishment, the punishment must fit the crime.

DRUG SCREENING

Many companies throughout industry conduct pre-employment drug screening. Many believe they can reach Utopia (i.e., a drug-free operation) by hiring employees who test drug-free. Some companies do not inform job applicants that their preemployment physical will include a screening for drugs. Such companies simply do not hire applicants who test positive. Others in the industrial community believe that such an approach is counter-productive and a waste of time and money. They contend that companies should let it be known publicly that all job

applicants will be screened for drugs. Thus, many drug users and abusers would not even bother to apply, and companies could avoid wasting time, money, and effort on those individuals.

The argument against publicizing preemployment drug screening is that individuals will temporarily abstain from drugs, clear their systems of these chemicals, and then resume their use or abuse of the substances once hired. Either approach may be perceived as a company's only security measure to protect itself from the drug world; in reality, however, both are merely tools to avoid dealing with the real problem of drugs in the workplace.

It is the accuracy of drug testing that concerns many, regardless of the approach. The concern for accuracy goes beyond preemployment screening to testing of current employees. Again, many companies erroneously believe they can reach Utopia by subjecting employees to periodic, random drug screening. Other concerns include:

- Lack of uniform testing methods
- Inaccuracy of some methodologies
- Volume of testing
- Chain-of-custody
- Confidentiality
- Proliferation of new laboratories trying to get into this new multimillion dollar industry.

LABORATORY SELECTION

Companies engaged in drug testing should not use cost as their only determinate in selecting a laboratory. They should use the services of a state-of-the-art laboratory. The laboratory must be prepared to defend its method, procedures, and results in a court of law or before an arbitrator. They are, after all, testing human beings—people with families, who are searching for or trying to maintain job security, and whose reputations and careers can be destroyed by a slipshod approach.

Companies and individuals would both suffer because of a slipshod laboratory. The company would bear the burden of false negative results, which would reduce its labor pool; individuals would bear the

burden and consequences of false positive results. Furthermore, by not using a first-rate laboratory with the highest possible accuracy rate, a company is practicing poor public relations. Whether it be preemployment or on-the-job drug screening, industry has a moral and community responsibility for good human—as well as humane—relations.

IN THE WORKPLACE

Drug abuse is an issue both in and outside the workplace. Some companies feel they can demand a drug-free environment, regardless of when or where the drugs were used or abused. Thus, a company may contend that drugs are "in the workplace" if an individual reports for work on Monday, with even a trace of drugs in his or her system from Friday night's use, irrespective of job performance.

Some employers have been told that even limited use of illegal drugs off the job can affect safe and effective job performance. Companies that look no deeper into the issue do themselves a disservice. They would only benefit by probing the questions: Is high-volume testing wise? Is it fair? Is it cost-effective? What is its impact on company operations and human relations?

DRUG SCREENING POLICY

A prudent company would conduct preemployment drug screening only after establishing its necessity. Thereafter, it would use a state-of-the-art laboratory. If necessary, it would test current employees on a limited, not mass, scale. It would conduct screening—even with highly sensitive public safety jobs—only if screening would reasonably resolve the problem. No general group of jobs should have across-the-board or across-the-nation policy. The problem, where one is shown to exist, should be dealt with on an individual operational basis. Furthermore, mass screening of all employees in all operations would overtax the resources of even state-of-the-art laboratories. This would cause inefficiency and result in increased human, mechanical, and scientific error.

JUST CAUSE—TESTING FOR CAUSE

Once a company had determined that it must implement a drug testing program, it should only test when there is just cause. What is meant by "just cause"? Just cause requires showing indisputable evidence, such as:

- Drug usage on company property
- Notable impairment when reporting for work or while on the job
- The sale of drugs on the job

No one should turn away from such actions. The safety of the individual as well as fellow workers is at stake. Other "indirect" evidences may give rise to "just cause," such as:

- Excessive absenteeism
- A sharp decrease in productivity
- Accidents

Even these circumstances should be supported by objective facts that relate them to drug use. These behaviors should be approached and handled in a completely different manner than direct offenses.

Organized labor has the privilege of approaching the issues of drug abuse on a plant-by-plant basis. Thus we can target human relations and take an interdisciplinary approach to drug abuse. Sometimes our policy and philosophy based on human/humane factors of discipline are acceptable to management; sometimes they are not. Fortunately, at some point, we reach a consensus near the middle. Hundreds of variables can impact disciplinary approaches. For example, what is the degree of proof of drug use? Was the drug use on or off the job? "Human/humane" factors—which are inseparable—must be of paramount importance when considering approaches to these issues. Therefore, organized labor should and will challenge drug testing policies that result in discipline and/or discharge simply because of a positive test, without considering other factors or alternatives. An alternative to absolute discharge would be an Employee Assistance Program or an employee referral program. Organized labor, of course, does not condone drug use or abuse; however, it will challenge ill-considered, less than prudent policies.

CONCLUSION

In discussing the drug issue, we must remember we are dealing with individuals subject to the pitfalls of both drug use and drug testing. We are a respected and powerful labor union and our members have some protection from imprudent drug testing policies. However, as more

companies adopt such policies, thousands may be wrongfully discharged—with no union, recourse, or day in court. Equally unfortunate would be those discharged or punished without a helping hand to turn their lives around—forever lost to the evils of drugs. We admire those companies, union and non-union, that have shown the sophistication and heart to consider human/humane relations by developing sound Employee Assistance Programs. More companies are coming to the realization that this approach can be very rewarding and profitable, in terms of saving both dollars and lives.

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Section 4

Successful Corporate Programs

EVOLUTION OF A CORPORATE DRUG POLICY

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In 1962, the Mobil Oil Corporation initiated a policy which, at that time, was not revolutionary but was certainly quite timely. This policy, implemented over 24 years ago, concerned the problem drinker and alcoholism among employees. It stressed that:

- Alcoholism was an illness requiring rehabilitation and treatment
- The illness was related to performance
- When performance was involved, disciplinary actions might follow, including termination.

The policy focused especially on alcoholism and was initiated as an illness rehabilitation. That was the remarkable thing about the policy.

In 1977, the policy statement was amended to alcohol and drug abuse. Mobil initiated a full range of alcohol and drug abuse policies oriented towards:

- Confidentiality, involving changes in disability and benefits—so that employees are completely covered as with any other disease
- Training of employees, supervisors, and recruitment people, so they can intervene early to identify performance-oriented behavioral changes, which could precipitate referral to our medical department or our alcohol-drug abuse counselors
- Rehabilitation treatment—so that, if rehabilitation resulted, all of the benefits are covered, the employee retains employment, and usually, the supervisor does not know the degree to which the medical department was involved or for what reason.

The original survey of 765 cases in 25 locations showed that approximately 71 percent were rehabilitated. That is exceptional in the general population but not in selected populations in industry.

In 1985, Mobil amended its procedures to include drug control in the workplace. Developing the amendment required over a year's time and the involvement of many groups. Mobil is a very diverse organization—with top management, a legal department, industrial relations and human relations representatives concerned with employee rights and privileges, and labor relations representatives reminding the company of its contracts. Consequently, we required a task force of all these people; the Office of General Counsel, representatives of the separate companies within Mobil, and the safety and security group. The task force met for about a year and developed a preliminary information paper to convince top management that it was time to implement drug control. While the task force was completing its paper, management came to the same conclusion on their own; general consensus in the public sector convinced top managers that Mobil was behind in its approach to the drug abuse problem.

At that point, Mobil individualized its alcohol and drug abuse policy, with minor changes for its multiple companies, and implemented it. A clear policy statement spells out core elements for each policy component, requires some elements in all Mobil companies, and yet allows individual variations. Individualized policies vary depending on the nature of the company, be it an exploration and producing company, a refining company that has tractor trailer drivers, or a company that has data processing or computer operators. Some individualization also occurs in procedures used by each company.

In general, the policy changes have been minor and are based upon the previous rehabilitation policy. The earlier policy outlines the methods of identifying individuals who have a problem and has been extended to include testing and searches.

The major components of the policy are:

- The work rule
- Enforcement procedures (drug control—screening tests and searches)
- Education and supervisory training
- Guidelines coordinating the use of rehabilitation with other control programs

THE WORK RULE

The work rule was probably the most important early decision. Specifically, management stated that Mobil has a rule against presenting oneself for work on company business under the influence. Mobil also has rules about presenting yourself for work if you are unfit for duty. The rules are related but are definitely not identical, and the separation of those two saved Mobil and its lawyers a lot of trouble.

In developing the work rule, we first had to determine that zero tolerance would be required rather than setting some level of impairment. Essentially, we found it is impossible to sort out levels of impairment in some consistent and fair way. We also learned that work rules can be set in the same way that work rules are made about having a time to work, explosives on the job, apparel, safety procedures.

The work rule states that an employee may not appear under the influence of substances. The difficulty is defining "under the influence." Mobil defines it as a level in the system that is above the designated level set by Mobil. The designated levels vary by substance. In conjunction with Mobil's laboratories, levels were chosen that indicate current use with some semblance of understanding about metabolic rates, detox rates, hydration, weight, body fat, depots, and all the difficulties relating these variables. These levels do not identify somebody who smoked a couple of joints on a picnic 3 weeks ago or even 3 nights ago. By setting levels that are quite liberal, Mobil calls negative some people who probably should be called positive. This error, however, means that Mobil will not err on the other side of the coin. Mobil determines "under the influence" as having the substance when screened. Failure to cooperate is deemed as failure to observe the work rule.

One final comment about the work rule—constructing the actual wording was difficult. About a year ago, every word in the policy was argued back and forth by the group drafting the policy. For example, the initial version said "while on employer/corporation property;" but we realized that we were confining ourselves, since a lot of Mobil business is not conducted on our property. In the same way, we used words like controlled substances. Some of the wording in the policy information paper tries to draw lines between authorized and unauthorized, as well.

ENFORCEMENT PROCEDURES

The only full paragraph added to Mobil's former 12-year-old policy about rehabilitation and treatment is that management may, to the extent necessary for safe and productive conduct of business, perform alcohol

and drug screening, searches or inspections of employees and their personal effects. This was added to determine whether an employee is in possession of or under the influence of alcohol, drugs, or controlled substances while on employer/corporation business.

The enforcement procedures are components of the policy so that Mobil can conduct screening tests and searches. Mobil has to have a specific basis for invoking the policy regarding any individual event. One of the bases, of course, is a preplacement test. That has only recently become universal in all Mobil Oil and Chemical operations. Preplacement screening will apply to all applicants for employment.

Mobil also has postemployment screening for cause and for reasonable suspicion. Mobil does not have random screening with one exception—DOT, tractor-trailer drivers have a drug screen at the time of their bi-annual over-the-road driving tests.

The searches and inspections are done with review by top management before they are permitted. Consent forms are used for all screening and search procedures.

Mobil uses the EMIT test as the initial screening and then the gas chromatography/mass spectrometry test for all positives. These confirmation tests are very exact and beat just about anything we know in standard diagnostic technology for the usual diseases, if applied after initial screening. Mobil is very careful about the testing laboratories. Most of all, great care is taken in the interpretation of test results; the medical department physician is involved in reviewing all positives before an answer is given to management.

The nature of any corrective action taken is based on whether there is a risk of injury or damage. For instance, just being under the influence may constitute suspension, rehabilitation, and return; successful return with screens thereafter; maybe suspension or termination because of failure to complete treatment. Immediate termination may result if there is a substantial personal and/or community health event involved in the precipitation of screening or search. Ultimately, if an employee is determined to be dealing and illegally distributing drugs, he/she may be referred for legal action, in addition. Mobil has its own medical department procedures which include careful elaboration of the steps to be taken, including care of specimens, and how Mobil's medical department will relate back to the supervisor in the case of a positive. A specific log also must be completed to document items such as the time, identifiers, the signed consent form, and then preparation for security of the specimens. These log procedures are designed to make sure that Mobil

does not behave in some way that could be suggested as irresponsible, unfair, or inconsistent.

EDUCATION AND SUPERVISORY TRAINING

Another basic component is the education and supervisory training. The first part of the program, the employee education unit, deals with the health aspects of alcohol and drug abuse, and the company's policies and rules on the subject. These education procedures precede the initiation of any such policy in any of the Mobil Oil Corporation and Mobil Chemical Corporation sites. The second part of the program focuses on training of supervisors and ER managers, concerning not only the policy but also some things they have already heard before (e.g., what performance or behavior indications suggest that someone should be referred for evaluation and/or screening, what happens with the tests and then with test results).

Fortunately, Mobil had 25 locations which took extensive training, brochures, time, and management attention, so the idea of supervisory training was not new to our people. However, the methods and the consensus on a procedure for a given unit was important to preserve consistency and evenhandedness in all instances.

The employee education program was designed to have employees understand that we have a problem. Any disciplinary action taken in a large company, or any large group of people, evokes a well-known reaction. Only a few may be violators, abusers, thieves, or cheaters, the other employees are hardworking, honest, diligent people who really do not appreciate the few who are not. So, the emphasis of the education program was:

- To give people who did not comprehend the problem an understanding of its depth and Mobil's efforts to help them and the company with it
- Educate individuals that we were about to initiate procedures to identify problems
- Inform employees who had the problem about the rehabilitation alternatives available to them

Last, we had to have specific guidelines to coordinate the use of rehabilitation with the other control programs such as searches, seizures, and disciplinary actions. The policy of Mobil Oil Corporation is one of

concern about the effects of alcohol or drug abuse on the health of its employees. Mobil may intervene when the individual's job performance becomes affected or where there exists potential impact on the safe and productive conduct of business. Safe and productive conduct of the business includes concerns about shareholders who wonder what Mobil is doing with the equity entrusted by them to the corporation. There is a responsibility to shareholders which must underline some of these concerns that we are talking about. Mobil policies regarding substance abuse in the workplace have a major impact on the safe productive conduct of its business and responsibilities to its consumers, the general public, and its other employees.

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DRUG ABUSE: A WESTINGHOUSE CORPORATE PERSPECTIVE

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GENERAL BACKGROUND

Change is inevitable, and humans are constantly seeking means to ease the transitions they face. Not surprisingly, chemicals are among the most frequently used mediators.

Agents that affect mental and emotional functioning in some desired fashion are particularly subject to misuse. Alcohol, the classic chemical of abuse, is a case in point. Despite availability of a broadening spectrum of psychoactive drugs, alcohol remains the most universally prevalent of such substances and is clearly the most dangerous chemical affecting the workplace.

Alcohol provides a pattern for understanding mind- and mood-altering drugs, offering its users pleasure, relief, rapidity of action, and a perception of enhanced coping. Unfortunately, as with other drugs of abuse, alcohol may eventually lead to some or all of the following:

- Psychological dependence
- Physiological dependence
- An increasing threshold to effects (tolerance)
- Turbulent withdrawal

Abusers once faced temporizing and denial, moralizing or punishment, and eventually fatalistic resignation. Then Alcoholics Anonymous (AA) demonstrated a potentially more rational and effective approach and proved that, given appropriate aid, the situation often was not hopeless. Recognizing addiction or drug dependence as a disease implied that treatment is possible and judgmental thinking inappropriate. Applicability of the disease concept is supported by these parallels:

- Characteristic symptoms
- A predictable course
- An almost inevitable outcome in the absence of treatment

Modern methods of treatment follow one of two main patterns. The *psychodynamic approach* is the one commonly used by psychiatrists. Unfortunately, many of these professionals confuse cause with effects. In their view, the individual drinks or uses other drugs abusively primarily because he/she has problems. However, more often, the individual's problems are largely due to the substance abuse itself. The effect has been to excuse and enable the abuse rather than to change destructive behavior patterns.

On the other hand, *the AA-abstinence model* and its parallels, such as Narcotics Anonymous, have proven far more effective. This has been true particularly in industry, where performance-based programs use the individual's desire to keep his/her job as a lever to bring about responsible behavior.

Despite appreciable gains, alcoholism and alcohol abuse continue to be major problems for industry. And, although abuse of other substances is not new to the workplace, it has significantly increased in recent years. Some of the major changes currently evident include the following:

- Employed chemical abusers are younger than before.
- Many more psychopharmacologic agents are available.
- Illegal drugs and permissiveness about them are commonplace.
- Polydrug use is the rule rather than the exception.

In general, the rising tide of drug abuse in America was slow in reaching business settings. However, as those who became adults in the 1960s and onward replace those of earlier generations, they bring with them a more permissive attitude and, not uncommonly, a history of personal drug experimentation. Thus, an estimated 70 percent of the workforce (among them many younger supervisors and managers) have tried compounds such as marijuana. A significant minority of them use drugs with some regularity. On occasion, at least, work performance and safety (their own and others') is compromised.

At the same time, businesses' ability to deal constructively with abuse of these substances continues to be hampered by the same terrible triad that has slowed progress in dealing with alcohol abuse: ignorance, denial, and reticence to confront. In addition, many of the physicians attending the medical needs of workers are grossly unmindful of the problem, often unwilling to make the diagnosis, and generally unaware of treatment options. Appropriate action has also been hindered by:

- Uncertain definition of what exactly constitutes drug abuse
- Emphasis on drug *use* rather than *effects* (i.e., poor performance)
- Judgmental attitudes by older supervisors
- Technical and functional difficulties of correlating determinable concentrations with degrees of impairment

However, several factors are stimulating a reassessment of the problem:

- Increased Federal interdictions
- Enlarged educational efforts
- Improved laboratory techniques
- Rising concern over health effects and medical costs
- Growing awareness of adverse impact on productivity and profitability

THE WESTINGHOUSE PURVIEW

Westinghouse introduced a corporate alcoholism procedure in 1979. Management thus had a standardized method to deal with employees whose performance and effectiveness suffer due to alcohol or, to some extent, other drug abuse. Until recently, that sufficed. Several factors militated against adopting special measures aimed at other drugs, including the following:

- The more prevalent problems in Westinghouse are alcohol-related.

- The average age in the workforce is beyond 35, which is the upper edge of the "drug generation." Several locations are in areas where cultural or religious attitudes delay introduction of new practices.
- The number and array of drugs and the tendency to polydrug use complicates instruction and supervisory learning.
- Diagnostic means are imprecise and legal issues cloudy.
- Treatment regimens and rehab/followup resources are less well-developed than for alcoholics/alcohol abusers.

However, three factors are forcing Westinghouse managers to focus more specifically on drug abuse:

- Quality and productivity are declining relative to overseas competitors.
- Occupational injuries and ills appear to be on the rise.
- Medical and disability costs continue to go up, seriously eroding profits.

Also, in some Westinghouse businesses, customer demands have prompted managers to confront the issue. Customers want Westinghouse employees who work on their premises to be certified as tested and drug free.

In its own consideration of the issue, Westinghouse management makes the following assumptions:

- Workplace drug abuse is a *real* problem.
- Abuse patterns vary with a location's demographics and setting.
- Extreme views of the problem's extent are erroneous. Reality is somewhere between the absurd allegation that "drug abuse in today's workplace is as common as the coffee break," and the unperceptive disclaimer that "maybe it's a problem elsewhere, but nobody here is into drugs."
- An absolutely drug-free workforce is probably unachievable.
- Effective interventions are available.

- A performance-based approach, as with alcoholism, is applicable.
- Educating all employees and effectively training supervisors are crucial.
- Comparing and contrasting lesser understood drugs with the more familiar drug (alcohol) aids learning.
- The issue for business concerns assuring employees' fitness for work.

The Westinghouse definition for drug abuse—"use that causes work problems"—is behavioral in nature. While the corporation disapproves of any inappropriate or illegal use of drugs, it cannot do much about private practices, such as experimentation or occasional so-called recreational use. Westinghouse certainly has no desire to start a witch hunt for drug users. It can, however, sponsor educational efforts, encourage its managers to be good role models, and teach its supervisors how to listen more and communicate better[1].

However, where a pattern of pathologic use impairs functioning (i.e., work performance) the corporation must act to encourage and support better choices by all employees and to redirect and rehabilitate abusers *before* they become unemployable.

SIZE OF THE PROBLEM

The true magnitude of America's drug abuse problem is not known. An estimated 10 percent of working Americans are more than casually involved with alcohol and other drugs. To find evidence that infers the problem's extent within Westinghouse, the corporation looked at several indicators. Three of these, described below, proved useful.

Westinghouse EAP experience. Many Westinghouse units have alcoholism programs. Some have more inclusive Employee Assistance Programs (EAPs). Others utilize the corporate procedure on an ad hoc basis.

Alcoholism/EAP reports from 1984 show about 1 employee in 200 newly

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1. Federal agencies, and, under some State laws, other employers are also required to take reasonable steps to accommodate employees with substance abuse problems. Such steps include treatment referral and job reassignment, if necessary, during treatment.

diagnosed as alcoholic and about 1 in 1,000 as an abuser primarily of other drugs. However, the formal corporate procedure is, in all too many cases, not applied until after the limits of management forebearance are reached. Also, these figures reflect mainly the alcohol aspects of the problem. It thus seems likely that these estimates represent only the tip of the iceberg.

Westinghouse security observations. Westinghouse security personnel recognize drug abuse as a factor in many undesirable activities affecting the worksite. They know by experience that most workplace crimes against property involve the traditional four Bs: "booze, broads, bennies (Benzadrine, an amphetamine), and bookies." It is not coincidental that two of the four Bs refer to drugs.

Westinghouse has clearly experienced increased cases of "possession, sale, or distribution" of drugs on its property. Also, like many other businesses, Westinghouse has undergone a sharp upturn in the number of defalcations, property thefts, etc., detected among the workforce. In part, this has been due to improved detection measures; but there has been a real, as well as an apparent, increase.

It is the considered judgment of Westinghouse Security that a disproportionate, though not overwhelming, share of this increase is attributable to employee involvement with drugs and the "deal or steal" methods of supporting expensive drug habits. While these observations are not definitive, they are consistent with other indicators of a sizeable and growing drug problem.

Westinghouse results from drug screening. These results are from a half dozen pilot sites that represent light manufacturing, "high tech," and service operations. Drug screening at these locations is directed mainly toward job applicants. The majority tested have been candidates for lesser skilled, lower paying positions. About one applicant in eight was seeking an engineering or other technical/professional position.

The combined total of applicants subjected to drug screening during 1985 exceeds 2,700. The proportion of positive drug screens was about 30 percent. The proportion of positives among professional candidates was about one-third of that seen among lesser educated and lesser skilled applicants.

As might be expected, THC (the active ingredient of marijuana) found in over 800 tests accounts for 98 percent of the positives. Cocaine was second, with about 1 percent of the total positives. The proportion of all other drugs combined was about equal to that of cocaine.

The very low incidence of positives involving cocaine is partly an artifact of cocaine being water soluble and, therefore, quickly metabolized and carried out of the system. By contrast, marijuana's fat solubility and consequent slow excretion allow for detection weeks after use. Unless testing occurs fairly soon after cocaine use, the evidence is gone and the result negative. Hence, each time cocaine is detected could very well represent a dozen missed due to an accident of timing.

Relevance of these applicant screening results to the Westinghouse employee population overall is open to question. Still, presumably they fairly represent at least those hired in the past several years, particularly for lower job classifications. Among about 1,400 employees also screened (long- as well as short-term employees), the reported positives amount to only about 1 percent, again almost totally due to marijuana. A factor in this low incidence may well be that repeated advance notice of intent to test had the deterrent effect intended.

The value of applicant screening and abuse deterrence seems to be affirmed by recent reports from Pacific Gas & Electric and from the Southern Pacific Railroad. The former states that it experienced a 40-percent decline in the rate of serious injuries, and the latter that serious incidents "resulting from human error" dropped by 77 percent after screening programs were instituted.

The three indicators above, when viewed in the context of a society where alcohol and various controlled substances are readily available and increasingly affordable, supply strong circumstantial evidence that drug abuse is indeed a significant problem among Westinghouse, as among other workers.

CORPORATE POLICY

Westinghouse is committed to the health and safety of its employees, the security of its stockholders' assets, and the profitability of its enterprises. It is concerned that the activities of its personnel and conduct of its businesses reflect positively on the well-being and other legitimate interests of its customers and of society, in general. It is also mindful of the privacy concerns and the rights of its employees as individuals and of the limits of technological methods of problem detection. All of these considerations enter into the corporation's position on the issue of drug abuse.

Westinghouse recognizes that drug abuse is a widespread social problem in America. It is well aware that its workforce is not exempt from that problem's effects. The corporation has no desire to dictate lifestyle

choices, but it is interested in employee health. It wants to encourage healthful practices and to discourage unhealthy and potentially destructive ones such as drug abuse. When chemical abuse occurs and the workplace is affected, Westinghouse is obligated to react.

A prompt response is called for whenever essentials, such as safety, are compromised. When rules against use, sale, or distribution of alcohol or other unauthorized drugs at the worksite or in the course of one's work are broken, swift, stern discipline must be applied. When performance suffers, preventable factors such as chemical abuse must be considered as possible contributors, and steps must be taken to correct the problem.

INTERVENTIONS

Role of supervisors. Key personnel must be taught how to monitor and document behaviors affected by substance abuse, such as attendance, presence at the work station, alertness, safety practices, quality and quantity of work, personal interactions with customers and with fellow employees, and effect on other persons' attitudes and productivity. They must learn the art of constructive confrontation to bring about behavioral change.

Preplacement assessment. Many of businesses' problems with troublesome employee minorities are traceable to inadequate assessment at the time of recruitment and hire. For example, failure to check an applicant's references forfeits opportunity to obtain information vital to assess employment suitability. And, failure to obtain or consider drug use history and to look for needle tracks or other physical or laboratory signs suggesting substance abuse may result in a serious and expensive problem.

Drug screening. Assuming judiciousness and sensitivity, drug screening can be a helpful procedure. Westinghouse sees such testing as appropriate during preplacement. It also views employee screening as acceptable, when the technique is applied in the following manner:

- Selectively (justified by need, rather than in shotgun fashion)
- Among workers aware of the reasons for testing and of the possible consequences of a positive test or of refusal to participate
- As a supplement to (never as a substitute for) adequate supervision

- With thorough weighing of costs, risks, and benefits

Such testing is now being done by about 30 percent of Fortune 500 companies as compared with 3 percent 3 years ago. Some 2.5 million tests were performed nationwide in 1985.

Westinghouse recently issued a paper entitled "To or Not to Test? Workplace Drug Screening," subtitled "A Reasoned Approach."

The paper advises Westinghouse locations that are considering instituting drug screening to go through a reasoning process. It encourages them to review proposed procedures with corporate legal and corporate medical authorities.

Two features in that paper, "Factors to Consider" and "General Guidelines for Screening," deserve particular attention.

WESTINGHOUSE PROGRAMS

The "Corporate Procedure on Alcoholism" has been modified to include other drug abuse. It has been renamed the "Corporate Procedure on Substance Abuse." The original prescribed actions to deal with alcoholic and alcohol-abusing employees. The modification goes well beyond this to include drug screening and other matters.

Westinghouse locations with active EAPs report that these programs, and the corporation's economic support of rehabilitation, are assets to the conduct of their business. Some recidivism occurs among those undergoing rehabilitation (as expected in a relapsing disease); but the Westinghouse success rate in cases of alcohol abuse, as judged by continuing sobriety and productive employment 2 years afterward, approximates 70 percent. Reported experience with other drugs recognized as major ingredients in problem cases has been more limited; however, anecdotal reports are encouraging.

Westinghouse locations are being urged to conduct drug abuse training programs for supervisors. Many are already doing so periodically, and others are expected to begin this year.

Concurrently, efforts are being made to inform Westinghouse employees and dependents about the drug pandemic and its effects on both work performance and personal effectiveness.

At the same time, drug screening is being introduced in a variety of Westinghouse settings. Use of this technique will grow. Screening objectives are to generate needed data and motivate employee avoidance of drug abuse. The intent is to:

- Detect evidence of drug abuse in applicants
- Determine prevalence of the problem among employees
- Document abuse in selected critical categories
- Deter employee misuse of controlled substances

In sum, current and anticipated Westinghouse programs are attempts to impart knowledge, affect attitudes, and change behavior.

Such programs have already been successful with alcohol-related problems. Experience gained can now be modified and applied to problems involving other drugs. The task is a large one, and much remains to be done. But awareness is dawning, interest and concern are present, and helpful steps are being taken.

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DEVELOPMENT OF AN EMPLOYEE ASSISTANCE PROGRAM AT WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

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INTRODUCTION

The primary mission of the Washington Metropolitan Area Transit Authority (WMATA) is to provide safe, efficient transportation to the public. WMATA employs over 7,000 individuals to carry out this mission. Due to the rapid rise in drug and alcohol abuse throughout the nation, WMATA recognized the need to develop a policy and program addressing the potential problems of substance abuse. The program now in operation meets the safety requirements of a public transit system while providing employees with an opportunity for rehabilitation.

BACKGROUND

Following is a chronology of events which led WMATA to establish a formal Employee Assistance Program and Substance Abuse Policy:

- January 13, 1982—A Metro subway train derailed, killing 3 passengers and injuring 22 others. An investigation conducted by the National Transportation Safety Board determined that "human error" was a key factor.

- October 14, 1982—The National Transportation Safety Board issued its final investigation report noting, among other things, that the personnel involved in the accident were not subjected to physical examinations following the accident.

- October 25, 1982—The Office of Rail Services instituted a mandatory post-incident medical examination policy that required employees to submit to a medical examination following a derailment; a train collision; a person being hit by a train; a

physical altercation (between an employee and a passenger or other employees); and any other incident which, in the judgment of a supervisor, causes an employee's physical condition to be questioned.[1]

- November 16, 1982—The Office of Bus Services instituted a mandatory post-incident medical examination policy following certain types of accidents; collisions with pedestrians; physical altercations (between an employee and a passenger or other employees); and other incidents which, in the judgment of a supervisor, resulted in an employee's physical condition being questioned. (This policy was implemented because of an apparent rise in the number of seemingly inexplicable bus accidents and a concern that alcohol and drugs might be involved.)

- December 20, 1982—Local 689, Amalgamated Transit Union (ATU) filed a class action grievance on behalf of WMATA's bus and rail employees. This grievance challenged the unilateral establishment of a policy and program requiring medical examinations (including blood and urine tests for alcohol or drugs) of employees involved in defined job incidents. The case was on May 26, 1983, and briefs were filed on July 5, 1983.

- September 6, 1983—Arbitrator Fred Blackwell issued his award denying the class action grievance and upholding WMATA's to implement its policy of mandatory post-incident medical examinations. Blackwell, however, pointed out that Local 689 ATU could continue to challenge the policy in individual cases on grounds such as misidentification of an employee's specimen, unreasonableness in application of the policy to a particular employee, inconsistent application, and questionable reliability of the tests for drugs (particularly the EMIT test for marijuana)

- February 3, 1984—The Office of Facilities Maintenance instituted a post-incident medical examination policy for all Facilities Maintenance employees following certain specified incidents.

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1. All WMATA divisions have rules regarding drug and alcohol use. Two divisions prohibit the use of controlled substances. Two divisions prohibit the possession or use of controlled substances on WMATA premises or during work time and also prohibit reporting for work or working when under the influence; these latter two divisions do not prohibit off-duty use of drugs. Also, drug and alcohol testing occurred only when (1) a patron complained about possible substance abuse or (2) a supervisor suspected a particular employee of being under the influence of intoxicants.

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Terminations Pursuant to the
Post-incident Medical Examinations and Subsequent Grievances

Between September 1982[2] and September 1984, the WMATA terminated approximately 142 employees following post- incident medical examinations which indicated the presence of alcohol and/or drugs.[3] Grievances were filed in virtually every termination case, and arbitration was invoked in approximately 57 cases.

The Landmark Arbitration Awards

Arbitrators issued a variety of awards in these cases. Some upheld the discharges, but many granted the grievances and overturned the discharges finding: (1) the EMIT test for marijuana was unreliable; (2) discharge was the equivalent of capital punishment without an opportunity for rehabilitation; (3) problems with chain of custody precluded accurate identification of an employee's specimen; and (4) although the tests revealed the presence of alcohol and/or drugs, there was no evidence that the employee was actually intoxicated or under the influence of intoxicants while working.

History of Negotiations

The WMATA unilaterally established an Employee Assistance Program (EAP) in November 1977 for those employees voluntarily seeking professional assistance for alcoholism, drug abuse, emotional problems, financial problems, and family-oriented problems. The program was never intended as a substitute for normal disciplinary procedures, and employee involvement in the program was extremely low.

In the wake of arbitration decisions requiring that employees be given a "second chance," the WMATA launched efforts to restructure the program to work in conjunction with disciplinary rules and the post-incident medical policy. Consequently, in December 1983, Local 689 ATU began informal dialogue with the WMATA. Local 689 ATU and the WMATA visited the Chicago Transit Authority to ascertain how they

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2. The early September 1982 termination was the result of a transit police officer actually observing an employee using marijuana.

3. The tests revealed the presence of the following drugs in employees: barbiturates, cocaine, codeine, marijuana, methadone, quinine, morphine, and sabecylate.

handled alcohol and drug abuse problems among their employees.

In April 1984, WMATA and Local 689 ATU began formal negotiations regarding the types of discipline to be imposed following positive test results from post-incident medical examinations. These negotiations contemplated expanding the EAP and using it as an alternative to discipline.

In April through July 1984, the WMATA engaged in an exhaustive review of the entire alcohol and drug abuse problem. This review included surveying 27 different transit authorities and their handling of the problem, researching available scientific and medical data; and meeting with medical, legal, and social experts, as well as reformed substance abusers. In addition, the staff worked closely with Operations to develop a program tailored to WMATA's particular needs.

In September 1984, the staff presented its proposed negotiated EAP plan to the WMATA Labor, Personnel, and Training Committee for its consideration and comments. Thereafter, the WMATA board's comments were incorporated and the proposed plan further refined. The final proposal was again presented to the Labor, Personnel, and Training Committee on September 25, 1984. The WMATA Board of Directors in Executive Session reviewed and approved the proposal on October 25, 1984. The Local 689 ATU ratified it November 6 and 7, 1984, and the parties signed it on November 29, 1984. Local 922 International Brotherhood of Teamsters signed on April 2, 1985. (These two unions represent all of the WMATA's operating personnel.)

COMPONENTS OF THE POLICY AND PROGRAM

Main Features of the Substance Abuse Policy and Employee Assistance Program

The Policy Program provides for two categories of employees:

- Category I employees—who are volunteers
- Category II employees—who test positive for alcohol or other drugs as a result of a post-incident medical examination.

Volunteers are encouraged to avail themselves of the EAP by giving them priority for non-safety sensitive jobs while in rehabilitation. Also, they continue to accumulate seniority and other benefits, and they can use EAP as often as necessary. In addition, an employee who volunteers

is not subject to random screening after they have succesfully completed rehabilitation.

Category II employees are immediately released from pay status and receive no benefits other than use of the vacation they had accumulated at the time of the incident or accident. When they return to duty, they are placed on 6 months of unannounced random screens. A second offense within a 3-year period will result in termination.

The length of time that an employee spends in a rehabilitiation program depends on the substance that is being used/abused. For example:

- Alcohol: 30 days minimum
- Marijuana: 90 days minimum
- Cocaine, PCP, Heroin and other drugs: 180 days minimum

These minimum durations will vary with a volunteer.

In October 1985, an Attendance Reporting Procedure was instituted for all Local 689 employees. This procedure sets forth the requirements for reporting absences, as well as the discipline to be imposed for violations of these procedures. Under these procedures, an employee who accumulates 12 points is referred to the EAP.

Employee Assistance Program

In January 1985, the WMATA formally implemented an Employee Assistance Program. This program offers assistance and referral for problems other than substance abuse (i.e., marital, interpersonal, financial, and emotional problems). The plan is comprehensive and involves a training program with all employees including: (a) Overview of Drugs; (b) Issues of Drug Use/Abuse While Working: What Can Happen?; and (c) The Role of EAP. The average monthly number of referrals was 15 in 1985.

From February through March of 1985, the WMATA held approximately 80 briefing sessions on the Substance Abuse Policy and Employee Assistance Program for supervisors and employees. These sessions were conducted by union officials and members of our Labor Relations and Personnel departments. Employees received a copy of the Policy.

Drug Testing

Our policy stipulates the minimum levels of substances which, when detected, give rise to a presumption of intoxication. This approach eliminates the need to prove impairment. The minimum levels are: .05 percent for alcohol; 5 ng for marijuana; and other drugs, any detectable level.

Both urine and blood specimens are collected at the time of an incident or accident for testing. In the case of alcohol and marijuana, disciplinary action is taken only if there is a detectable level in the blood. With other drugs such as cocaine, PCP, and heroin, any detectable level in the urine is cause for action to be taken. All test results are *confirmed* either in the blood or urine, depending on the substance.

The WMATA implemented a chain-of-custody form and procedures in 1985.

The WMATA now collects post-incident urine and blood specimens, and places employees on random screens.

Oversight Committee

Following implementation of the Policy and Program, the WMATA established a joint Labor-Management Committee to oversee the Policy and Program and assume responsibility for its success. The Committee comprised three members of management, three business agents from Local 689, and one business agent from Local 922.

RESULTS TO DATE

In the first 11 months of 1985 approximately 30% of all tests were positive. Several trends in drug usage were noted. Marijuana was identified most frequently in urine screens, ranging from 72 percent of screens in February to 30 percent in September. Significant but lower rates of use were found for alcohol, cocaine, and PCP (ranging from 5-25%).

LEGAL CHALLENGE

On January 9, 1986, the U.S. District Court for the District of Columbia (Civil Action No. 84-3072) dismissed a lawsuit filed by 18 employees who were challenging their terminations, resulting from positive post-inci-

dent medical examinations for the presence of drugs. The basis of the challenges was that their terminations deprived them of their 4th and 14th amendment rights and the right to privacy. In addition, they alleged negligent terminations, violations of the Rehabilitation Act of 1973, and violations of 42 U.S.C. 1983.

The Court held that the WMATA's administration of these post- incident medical tests, as well as the policy decision to terminate those employees who tested positive for the presence of drugs or alcohol, were governmental functions for the common good and in public interest. Therefore, WMATA was immune to civil litigation. In support of its conclusion that this was a governmental function, the Court found that the risk of serious injury is apparent, given the speed and closeness within which the buses and trains operate in the congested metropolitan area; thus, even the slightest decrease in alertness and reflex ability increases the danger of accidents.

Most recently, the WMATA has had to arbitrate a number of discharge cases of employees who refused to submit to a post- incident medical examination. In those cases, the arbitrator has evaluated whether just cause exists for discharge by analyzing the following issues:

- Was there a reasonable request by a supervisor for a drug or alcohol test pursuant to those particular work rules which prohibit the use, possession, etc., while on duty? (Substance Abuse Policy, or the Post-Incident Medical Examination Policy.)

- Was the employee given clear notice that his/her refusal will result in serious discipline, up to and including discharge? (The post-incident medical form is read and should be signed by the employee; if the employee refuses, this is documented.)

- If the employee tests positive was the employee told that his/her job may be saved through rehabilitation offered under the EAP?

- Did the employee make an unequivocal refusal to take the test? (have a witness - another supervisor if possible)

- Did any mitigating factors exist which should have been considered (e.g., was the employee suffering from a physicial or emotional impairment which explained his/her refusal)? Did evidence exist of showing disparate treatment?

CONCLUSION

To date. the Substance Abuse Policy and Employee Assistance Program appear to be working—as evidenced by an increase in the number of volunteers. This increase has been partially due to the fact that the WMATA provided various safeguards, including:

- Identification of a testing laboratory to provide expert witness testimony as well as qualitative and quantitative test results
- Development of a chain-of-custody procedure
- Development of program procedures on a case-by-case basis
- Identification of expectations from treatment resources
- Inclusion of program evaluation as soon as possible (focused not only on cost effectiveness but also on clinical case management assessment)

Cooperation between management and labor is the key to the program's success. The efforts of the WMATA's Joint Labor-Management Committee have been highly effective. The existing policy and program create a broad program that addresses WMATA's concerns while safeguarding employee rights.

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THE TRANSPORTATION INDUSTRY

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INTRODUCTION

The transportation industry is similar to other large industries in employing many people working in a variety of occupations. Safety responsibilities are not different from other industrial concerns. Employees expect a safe workplace; they expect their fellow employees not to contribute risks to their mutual working environment. There is, however, one major difference between transportation and other industries regarding safety issues. Common carriers (e.g., airlines, bus companies, and railroads) provide transportation services to the general public. Moreover, Congress mandates that this service must be provided with the *highest* degree of safety. Thus, a higher safety standard is required—far greater than we owe to each other, as private citizens in our own cars, to cite the most common comparison. This standard, therefore, dictates many of our activities related to drug abuse in the workplace.

DRUG ABUSE CONSIDERATIONS

Drug abuse is an amorphous subject. It is important to distinguish between legitimate and medically appropriate drugs; drug abuse, drug use, and the use of illicit drugs. These terms are often used interchangeably.

A wide variety of drugs are available and used in great quantities. Random samples within our own laboratory at American Airlines indicate that about 35 percent of a relatively healthy walk-in population applying for employment have some drug in their systems. Most are simply over-the-counter medicines such as those used for colds, coughs, insomnia, etc. Nevertheless, Americans are obviously conditioned to use drugs for many purposes. We expect drugs to help us wake up, go to sleep, gain weight, lose weight, pep up, settle down, and so on.

Americans in particular seem to be enamored with excess. In part, that explains our progress in many activities. However, it creates a problem in drug usage. If one's physician says, "Take one tablet three times a day," the patient too often reasons, "I'll take two tablets three times a day, and I'll get well twice as fast." Or he may say, "If I take three tablets six times a day, I'll feel six times as good."

The misuse of prescription and over-the-counter drugs is probably the most common type of drug abuse identified in the workplace. Related, but sometimes less serious, are cases in which the patient feels better and thus discontinues his drug prematurely. Diabetics and psychiatric patients probably represent the most serious examples of the drug omission group.

Anyone taking a drug which is not suitable can be considered a drug abuser. For example, if one were allergic to penicillin and yet took some anyway, the result certainly would be a type of drug abuse. While this is unlikely, a related problem is common. Unfortunately, many people have taken prescription drugs which were originally intended for friends or relatives. The result is once again a type of drug abuse. The results can be totally unpredictable.

Last, and probably of most interest, is the abuse of licit drugs, obtained illicitly, or the use of illicit drugs. Marijuana and cocaine are the two most common in this category, but heroin, PCP, amphetamines, barbiturates, and others drugs are also used. It is interesting to note that cocaine is not actually an illicit drug, and even marijuana is legitimately used for certain research purposes. However, the overwhelming percentage of both drugs is obtained illicitly, "on the street." All drugs of this nature are used for their psychotropic actions.

DRUG USE CONSIDERATIONS

A common carrier, like any company, is obliged to assure itself of the fitness for duty of any employee. This is not limited to concern about drug use. It includes aspects of musculoskeletal ability where physical skills are part of the job; it includes aspects of sensory ability where visual or aural skills are required for the job; and it includes aspects of cognitive ability where these attributes are required.

Drug use can be examined in two categories. The first concerns why the individual is taking any drug in the first place. If the drug is an analgesic, for example, what is causing the pain? Is this condition itself reason for a finding of unfitness? As an example from the airline

industry, should a pilot be flying while taking an analgesic for a toothache? The question might be better stated by asking if the toothache or perhaps even abscess is severe enough to cause a distraction at a critical time during flight? If so, that pilot is really unfit for duty. The painkiller is not really the primary concern.

The more common question deals with the psychotropic actions of various drugs. In some cases—mild tranquilizers as an example—the drug may be entirely compatible with the job function in question. In others—consider our pilot again—they may not. Various lithium compounds or the major tranquilizers may permit someone with a bipolar affective disorder to function adequately in a clerical or secretarial position, but both the drugs and the underlying condition speak against the individual occupying a critical position in any major governmental, military, or industrial enterprise. This is not to say that this disorder is an absolute contraindication: as our therapeutics improve, we clearly must evaluate each case individually.

In the case of marijuana and cocaine, the psychomotor effects argue against their use by persons operating vehicles in common carrier service. Their effects on judgment are also of concern. Although judgment decrements are more difficult to quantitate than are psychomotor degradations, they appear to be at least equally serious. The overwhelming majority of aircraft accidents, perhaps as many as 90 percent, are judgment errors by the pilot. If this judgment is clouded by drugs, the propensity for an accident increases astronomically.

DRUG ABUSE AND AIRLINE EMPLOYEE GROUPS

It is obvious that pilots must be fit for duty in every way. The visual and manipulative skills required of pilots are difficult to quantitate. Even more elusive are the judgment skills. There are some studies which attempt to quantitate these requirements. Definitive studies probably have yet to be performed, but we can accept intuitively that the requirements are significant.

Flight attendants are not commonly considered as critical to flight. Much of their time is spent ministering to passengers. They are in part placed on the airplane to assist passengers in the event of an emergency. Happily, true emergencies are extremely rare, but they do occur. And when they do, the lives of the passengers may be solely in the hands of an alert and capable flight attendant. Emergency evacuations may occur with only a few seconds notice if that. A fire may complicate the problem. Even a relatively simple emergency, such as an oxygen mask

drop, can require quick thinking and action on the part of a flight attendant. Viewed in this light, it becomes apparent that any cabin crewmember under the deleterious influence of a drug represents an unacceptable risk to passenger safety.

Selected ground employees are also vital to flight safety and can be every bit as critical as flight crews. Included in this group are dispatchers and load agents. A mistake can result in an aircraft attempting a takeoff overloaded, out of balance, with insufficient fuel, or from an inadequate runway. These mistakes can result in a disaster. There are checks and procedural double checks which should prevent a misjudgment on the part of any single dispatcher or load agent from being catastrophic. Unfortunately, Murphy's Law is alive and well in all aspects of aviation. Related to the effects of drugs, the stage may be set for a major accident.

Seldom considered is the role of the meteorologist. An error here, commonly in the form of a failure to appreciate the rapidity of change or seriousness of winds and weather, can result in another operational problem.

The mechanic behind the scenes is yet another critical link in the chain of aviation safety. Care in overhauling and maintaining the aircraft is essential. Mechanics under the influence of drugs, may not appreciate the significance of what might appear to be superficially small faults. Vision impairment may affect their ability to notice these faults. Short-term memory loss may result in the failure to install vital safety clips or wires.

In the not-too-distant past, one airline had a dramatic example of a wide body aircraft in which two engines failed, and the remaining engine was on the verge of failure. The cause was the failure of engine mechanics to notice that three very small rubber "O" rings were missing. While drugs were not implicated in this particular episode, it is exactly the sort of event which could be drug related.

Last, but by no means least, even baggage and freight handlers have significant safety responsibilities around air carrier aircraft. Improper loading of cargo can result in hazardous material spills. It can also result in an out-of-balance aircraft which is difficult or dangerous to fly.

Most of the handlers also drive baggage tugs and aircraft tractors in the unstructured environment which surrounds aircraft arrivals and departures. A vehicular accident here could result in an engine explosion with resultant carnage as an entire airplane goes up in flames.

One recent accident was caused by a baggage handler under the influence of cocaine. The individual struck an aircraft with a baggage tug. While there were no injuries, the collision resulted in almost one million dollars worth of damage.

MEANS TO MINIMIZE THE PROBLEM

This area is probably the most controversial of all. Our attorney colleagues will debate the possible infringements of individual rights. However, we cannot under any circumstances permit an individual the right to use illicit drugs while jeopardizing the safety of another individual.

A company must always assure itself of the fitness for duty of its employees. Whether this is best done by random sampling of all employees, or simply by testing when there is reasonable cause, has yet to be determined. It is probable that either statutory requirements or case law will eventually tell us whether or not routine or random sampling will be permitted.

There is still another technique which may be considered. This is simply the screening of all applicants for new positions within the company. Obviously this will never eliminate a drug problem within a given company. An applicant can be drug-free during the hiring process, but begin to use drugs after being hired. However, it does tend to eliminate persons who use drugs casually or with so little concern for their effects that they appear for a preplacement examination with drugs in their systems.

AIRLINE EXPERIENCE

A number of the major carriers, including American Airlines, screen for the presence of drugs during the preplacement phase of the hiring process. American Airlines was one of the first to do so, but our experience is not significantly different from those of other carriers. Several interesting conclusions have been reached as a result of our collective experiences.

Among applicants for all positions, marijuana seems to be the drug of choice. Granted that it is now relatively easily found, it is far and away the most common finding. Cocaine, on the other hand, is seldom found. It has a short biological half-life and is probably used less often than

marijuana. Most important, however, cocaine is almost never found by itself. When found, it almost always has been accompanied by marijuana.

Heroin, PCP, and other potent drugs of this type are very rare among airline job applicants. The reason is unclear, but one can speculate that many employees are public contact employees, and they are screened for their appearance. It is possible that those who have progressed to potent drugs no longer have the public appearance impact needed to pass the personnel screeners. Therefore, they are never sent to the medical department for examinations.

The employee group *is* important in analyzing drug screen findings. For example, pilots are very literal and concrete people for the most part. They are machinery controllers who deal in realities rather than in an abstract world. They do not like to be passively controlled: therefore, they do not seem to use many drugs. Only about 1 percent of those who apply for pilot positions test positively for marijuana.

Young flight attendant candidates, on the other hand, test positively for marijuana in about 8 to 10 percent of our applicants. The majority are young women not long out of school. Ticket agents and reservation agents appear to be similar to the flight attendant group with respect to drug use. Many of these are also young women.

The geographic location has a significant impact. Ground applicants who handle freight, cargo, and baggage tend to run relatively high rates for marijuana. While the test results for this group in the midwest tend to match the flight attendant applicants results, the percentage of positives in large metropolitan areas on the east and west coasts has reached almost 25 percent.

OTHER OPERATIONAL PROBLEMS

Most large air carriers operate superb communications and computer systems. These are vital to reservations and inventory control. However, a recent failure to load programming data in one airline computer resulted in a major computer crash. The cost has been estimated as high as $19 million dollars in lost reservations and fees. This failure to load critical data has in turn been traced to a computer operator who apparently was "high" on marijuana when the data should have been loaded. Although no safety hazard resulted, this was obviously an expensive "joint."

HEALTH COST ISSUES

The health issues are not peculiar to an airline or other common carrier. American Airlines, for example, has roughly 50,000 employees. Depending upon whose figures are used, the costs annually for drug use and abuse amount to something in the seven to eight figure bracket. This is over and above the safety and operational considerations mentioned.

The airline industry has in the past been particularly generous about disability benefits. Obviously, the industry is changing dramatically now, but these still represent a very large expenditure. When they are aggravated by the sequelae of drug use, they become prohibitively expensive.

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Section 5

Consensus Statements

GENERAL CONSENSUS STATEMENT ON DRUG ABUSE* IN THE WORKPLACE

I. Drug abuse is a significant public health problem; it is pervasive in our society.

- The National Household Survey, conducted for the National Institute on Drug Abuse, indicates that 19 percent of Americans over 12 years of age have used illicit drugs during the last year.
- In the 18 to 25 year old adult population, representing those entering the work force, 65 percent have used illicit drugs, 44 percent in the last year.
- The Alcohol, Drug Abuse, and Mental Health Administration estimates that alcohol and drug abuse cost nearly $100 billion in lost productivity each year.
- The human cost to society and the social, economic, and legal costs to business have created a new awareness of the multifaceted problems resulting from alcohol and drug abuse, and there is consensus among government and business that action must be taken to lessen these costs.

II. Drug abuse in the workplace is a problem which must be addressed forthrightly and decisively in a fair and equitable manner with due consideration of the rights of the employer, employee, and the general public.

- The elements of a drug abuse policy should be based on the rationale that use of drugs, including alcohol, by employees in the workplace is unacceptable since it can adversely affect health and safety, security, and productivity, as well as public confidence and trust.

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*As used in these statements, drug abuse includes the use of illicit substances or misuse of controlled substances, alcohol, or other psychoactive drugs.

- The process for developing such a policy should include input from all aspects of an organization, including: labor relations, union, legal, medical, security, and employee assistance staff.

- The resulting policy should clearly state the employer's rationale and expectations regarding drug use—and the action to be anticipated in response to drug use. Employees should be explicitly informed of company policy and made aware of the consequences of drug use. Once a policy is established it should be strictly adhered to and closely monitored to ensure that it is administered fairly and consistently.

- Supervisors and coworkers can be vital in the early identification of problems, in encouraging fellow employees to self-refer for treatment, and in forming social support networks during and after treatment.

III. Drug abuse policy should be developed according to the best available current knowledge about abuse and its consequences.

- Expert advice should be obtained when developing the technical aspects of the policy, program, and procedures.

- Employers should become involved in the early identification, treatment, and followup of employees with drug abuse problems.

- Urine screening can be an effective tool in the early identification of employees with drug problems and should be considered as a useful technique within the overall program. Extreme caution must be exercised to assure that the collection, handling, and testing procedures are reliable and accurate.

- Self-referrals as well as company referrals to treatment should be accorded maximum respect for individual confidentiality consistent with safety and security issues.

- Followup procedures should be developed which ensure effective treatment and rehabilitation. However, alternative actions, including dismissal, may be appropriate for those who are unwilling or unable to return successfully to the workplace.

HEALTH AND SAFETY ISSUES CONSENSUS STATEMENT*

All companies or agencies should ascertain whether the abuse of drugs is an issue for them. If it is, they should consider how a constructive outcome could best be achieved for all concerned and whether the appropriate response should include drug screening. Each company or agency needs to identify and examine its own assumptions in these regards and decide what action is required, what is responsible, and what is realistic.

1. Is drug screening a reasonable component of programs designed to reduce drug abuse in the workplace?

The decision to establish a screening program for drug abuse should be based upon conclusions after considering: (1) the awareness of or concern about impaired performance at the worksite; (2) the impact of drug abuse upon the health, safety, security, and productivity of employees; and (3) supportive or alternative means to detect drug use in the workplace.

If the decision is to introduce drug screening, consideration of the usefulness of drug screening in assessing employees' health and/or fitness for duty is important.

A substantial amount of literature—compiled by law enforcement and drug rehabilitation agencies—exists today describing the debilitating effects of drugs. The evidence clearly indicates that a negative relationship exists between being under the influence of alcohol and/or certain drugs and the ability to perform a job with regard to judgment, interper-

*This panel included representatives from the corporate medical offices of several large corporations operating in the computer, oil, manufacturing, personal products, automobile, publishing, and airline businesses. Additional members represented a medical laboratory, a business consulting firm, a corporate security office, the administrative office of a large medical center, and the Federal government.

sonal relationships, manual dexterity, and the utilization of skills. The evaluation of employees to determine fitness for duty has long been performed in industry. Within the context of occupational medicine programs, medical examinations were initially performed to ensure the selection of personnel free of medical conditions which would be likely to interfere with their ability to work safely and efficiently. In recent years, within the context of health promotion and wellness programs, an additional purpose of the medical evaluation has evolved; that is, to address risk factors that may impair employee health, e.g., poor nutrition, drug abuse, hypertension. As the incidence and prevalence of drug abuse in the United States has risen, many companies have developed preemployment and in-service drug screening programs to ensure the safe and productive conduct of their businesses. These programs permit early identification and referral for treatment of those employees with drug abuse problems. The integration of drug screening with programs for employee assistance, rehabilitation, treatment, education, and the application of appropriate management action are components of a comprehensive program to confront drug abuse in the workplace.

Although urine screening technology is effective in determining prior drug use, positive results of a urine screen do not prove intoxication or impaired performance. Drugs or their metabolites may appear in urine for several days, even weeks (depending upon the drug), without apparent impairment. Screening may be used to support evaluations of impairment, identified as performance deficiencies or histories of safety or behavioral problems. Because the evaluation involves interpreting biological tests and differentiating drug use impairment from other types of impairment, the drug screening program should be under direct medical supervision, or with technical interpretive input from the responsible medical resource.

2. What questions or issues should be addressed when developing a preemployment screening program?

Drug screening includes detection of chemical substances that may compromise the safety, security, and performance of employees. Companies should inform job applicants that drug screening is a required part of the preemployment examination. In most companies, a confirmed drug presence in urine would have a serious negative impact on an applicant's chances for employment. The drug screening is only one component in the overall applicant evaluation process, but if the applicant cannot provide an acceptable explanation for a positive finding, that applicant usually would not be offered employment. Individual company policy determines the disposition of the application. These policies

may allow reapplication based on functional requirements of the position. Companies should inform applicants when the reason they are not hired is a confirmed drug presence in urine. When applicants are informed of a positive drug screen, the company should provide some level of counseling or information to the applicant regarding risks involved in drug abuse.

3. What questions or issues should be addressed when drug screens are proposed for in service employees?

When a drug policy is established, the rationale should be stated for the target employee population. The rationale should link testing to performance, safety, and security criteria. When an employee's drug screen is positive, rehabilitative help should be offered. However, safety and security considerations for the employee and his or her fellow workers are a first priority and must take precedence over other considerations. Managers should attend awareness programs to help them identify employees with performance or conduct problems and should refer them to appropriate resources.

If an employee whose job involves safety and security concerns refuses rehabilitation, management must be informed and appropriate administrative action taken. This may include probation, suspension, or dismissal. If the employee volunteers a problem without performance, safety, or security considerations, management should not be notified because of medical confidentiality. Even when performance, safety, or security issues are involved, communication to management concerning suggested restrictions or administrative procedures should maintain privacy to the extent possible.

Companies have varying views and practices for handling multiple offenses. The type of drug abuse is pertinent to their evaluations and actions. In all probability, few companies would allow a heroin user a second offense without strong administrative action, whereas an alcohol or marijuana user might be allowed another rehabilitation opportunity, depending on the time between offenses and the nature of the job. Data are lacking concerning the most effective treatment modality, but several weeks of intensive residential treatment for a significant drug problem may provide the best chance for recovery. In selected cases, intensive nonresidential treatment may be effective.

In addition to the Employee Assistance Program, drug awareness and education programs should be offered to employees and members of their families.

4. What are the potential risks of drug screening to the employer and the employee?

Because there are very real risks and consequences for employers and employees of both false positive and false negative test results, it is critical that laboratory and test procedures meet certain standards. Within the company, a drug screening program must assure proper handling of both specimens and their results. The integrity of the drug test begins with the specimen collection and transport as described by a well-documented chain of custody, and continues through the choice of laboratory and assay tests.

For those situations where the ultimate sanction is termination or denial of employment or the benefits of employment, it should be mandatory that samples be analyzed by those methods and by those laboratories which will assure an accurate chemical result. Positive urinalysis results should always be confirmed by an alternate methodology to that used for the initial screen. Because confirmation by gas chromatography combined with mass spectrometry (GC/MS) provides the best level of confidence, this method is rapidly becoming the confirmation method of choice and is mandated by the Department of Defense for confirmation of all positives. It is, therefore, recommended here as the confirmation method of choice even though other methods may be acceptable in some cases.

Because of the rapidly increasing demand for urinalysis and recent concerns about quality assurance deficiencies in some laboratories, certification and proficiency testing of urinalysis laboratories should be mandated. Certification programs are currently being developed but are not yet readily available. As part of laboratory certification, the individuals in the laboratory who perform the assays and, in particular, the individuals who interpret the results and advise the client as to the appropriate procedures should have the proper training, credentials, and experience in such work. Until certification and proficiency testing programs are available, the employer should take responsibility to assure that the laboratory's performance is optimal by demanding the use of internal and external quality control procedures, and by instituting external quality control themselves through the use of blank samples, split samples, and spiked samples.

The pervasiveness of drug abuse in society and, in particular, at the worksite raises issues of privacy and confidentiality. Although employers have expressed the opinion that expectations of privacy and confidentiality must be balanced against other principles such as safety, security, and efficient performance, every effort should be made to maintain the

confidentiality of employees' drug records, including test results. The *Code of Ethical Conduct for Physicians Providing Occupational Medical Services* adopted by the American Occupational Medicine Association and the American Academy of Occupational Medicine recognizes that employers are entitled to counsel about the medical fitness of individuals in relation to their work, but are not entitled to diagnoses or details of a specific nature.

LEGAL AND SECURITY CONCERNS CONSENSUS STATEMENT*

1. Are there ethical issues that should preclude action by an employer to restrict or prevent drug abuse among employees?

Testing for drug abuse in the workplace raises serious concerns regarding employer intrusion into the privacy of employees' activities in their off-duty hours. Such testing programs should be conducted in a fair and equitable manner with the highest regard for protecting the privacy of employees.

However, other concerns must be weighed in addition to an employee's right to privacy. These include the employer's obligation to provide a safe environment for the employee and the public, to provide a safe and high quality product or service for the customer, and to protect shareholders from unnecessary financial loss due to drug abuse among employees.

Drug abuse has reached such serious levels in the United States that every public and private employer must give careful consideration to whether action is necessary at his/her place of employment to attempt to reduce or eliminate drug abuse among its employees. A balancing of the ethical concerns created by drug use in the workplace will, in many cases, result in a need for employer action to screen prospective and current employees for the presence of drugs of abuse.

2. Under what circumstances and by what means is it appropriate to test employees and applicants for employment for drug abuse?

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*This panel included attorneys representing the legal departments of major aerospace and high-technology manufacturing companies, several commercial medical laboratories, a major law firm, and two Federal agencies. Additional members were from the Employee Assistance Programs from two large corporations, a corporate security director, and attorneys from civil liberties and legal protection groups.

Screening of applicants for employment for drug abuse by any private or public employer is appropriate, and a negative test may appropriately be considered a condition of employment. An employer should consider directing employees or applicants with positive tests to seek help.

Such programs should be conducted pursuant to standards of fairness. It is in the best interests of labor organizations and employers to cooperate in providing reasonable programs to test employees for drug abuse.

Drug testing programs should be fully disclosed to employees in advance. The employees' rights and the availability of treatment programs should be fully explained in advance to all employees subject to such testing.

Testing of employees for drug abuse must be conducted only through methods with proven reliability and should be conducted in strict compliance with the appropriate procedures for those tests. The courts have upheld the use of urine testing as a reliable method of screening for drug use. However, positive tests should always be confirmed by a second test using an alternative methodology before any action is taken which may adversely affect employment.

A requirement that current employees submit to urine testing for drug use is appropriate and legally defensible if there is reasonable suspicion based on specific facts and rational inferences drawn from those facts to conclude that employees are currently engaged in drug abuse.

Testing may also be appropriate as a part of a routine, periodic physical examination, including a return-to-service examination. Additional testing requirements may be warranted for employees who perform tasks that directly affect the safety of the public or other employees and for employees in sensitive security positions. Testing may legitimately be required after on-the-job incidents that may indicate impaired performance, such as accidents. Qualifying incidents should be clearly defined in advance, so that supervisory discretion is appropriately limited. Such incidents should be limited to those truly significant in the particular workplace.

Random screening for drug abuse under a well-defined program employing neutral criteria is also appropriate and legally defensible in certain circumstances, but should be limited to situations where it is essential that an employee be entirely free of any effects of drug use. Such circumstances shall include, but not necessarily be limited to, employees who directly affect the safety of the public and/or other employees.

Any drug abuse policy should carefully delineate what is required of the employee, and the testing methodology selected should be well adapted to enforcement of the policy. For instance, in a workplace where safety or security concerns are at issue, the employer may have a policy forbidding use of certain drugs on or off the job. In that case, a confirmed-positive urine sample may provide a proper basis for discipline (assuming observance of established procedures for hearing and dispute resolution). Similarly, where the inquiry relates to whether a drug abuse problem is contributing to a long-term decline in performance (e.g., absenteeism, reduced productivity), one or more positive urine samples may assist a clinician in determining that an employee has a chronic drug abuse problem that requires treatment. However, if the subject of an inquiry is whether or not a serious job-related incident, such as an accident, occurred because an employee was impaired by the acute effects of a drug while on the job, then the employee should be given the opportunity to provide a blood sample at the time a urine sample is collected.

3. What can be done if an employee or prospective employee tests positive for drug abuse?

If a prospective employee receives test results indicating the use of illicit drugs, an employer may deny employment to that individual on that basis. However, that employer is encouraged to aid the prospective employee in entering a drug treatment program, if appropriate, and to reconsider him or her for employment if such a program is successfully completed or if subsequent tests demonstrate that the employee is no longer engaged in drug abuse.

If a current employee receives test results indicating drug abuse, action taken regarding that person's employment should depend on the nature of the employee's work. Although it is appropriate and legally defensible to suspend or terminate immediately any employee who has responsibilities directly affecting the safety or security of the public or other employees, employers should consider providing an opportunity for that employee, and other employees who test positive for drug abuse, to enter a drug treatment program and to be eligible for reinstatement in an appropriate position upon successful completion of that program. It may also be appropriate in certain situations of casual or infrequent abuse to allow an employee to demonstrate by one or more future negative tests that the drug abuse has been stopped. An employer is justified in terminating the employment of any employee whose test yields results indicating drug abuse after appropriate opportunities for treatment or cessation of such abuse have been provided.

4. What degree of confidential treatment must be given to positive test results?

All information obtained in the course of examinations, rehabilitation, and treatment of employees with drug abuse problems shall be protected as confidential medical information. No data concerning this information or participation in any rehabilitative program should be made part of the employee's personnel file or should be provided to any other party without the direct written consent of the employee except as required by law or by established company policy in connection with the adjudication of that employee's rights.

The purpose of testing for drug use at a place of employment should be primarily to protect the safety and integrity of the workplace. Therefore, an employer should not routinely make the results of positive tests for drugs available to law enforcement authorities. Although employers should cooperate with investigations of drug trafficking insofar as their employees and/or their workplace are involved, the results of drug screening tests of individual employees conducted for employment purposes should not be provided to law enforcement authorities except as required by law.

5. What is the potential liability of an employer for testing or failure to test employees for drug abuse?

Given the existence of reliable technology for determining if an employee is engaged in drug use, an employer who fails to test prospective employees and current employees as appropriate may face increased liability if a drug abuser injures another employee or a member of the public. Potential liability of an employer who requires appropriate drug screening for employees can occur in circumstances such as the following:

a. Negligence in the manner in which the specimens are collected, the tests are conducted, or the specimens preserved;

b. Improper disclosure of the fact that an individual employee has received positive test results;

c. Failure to comply with collective bargaining agreements or other contractual obligations to employees in taking adverse action regarding an individual's employment based on evidence of drug abuse;

d. Failure to take appropriate action to remove a drug abuser from a position directly affecting public or employee safety after receiving positive test results.

6. Legal requirements aside, what are the ethical obligations of an employer to employees who test positive for drug abuse?

The primary emphasis of workplace testing programs to screen employees for drug abuse should be rehabilitative rather than punitive for employees who receive positive test results. To the extent that it is consistent with the safe operation of his/her business and maintenance of public confidence in the product or service, the employer should provide an opportunity for employees either to enter a drug education and rehabilitation program and to be considered for reinstatement after successful completion of such a program or to demonstrate that the pattern of drug abuse has stopped. Eligibility for reinstatement should depend on the frequency and seriousness of an employee's involvement with drugs.

HUMAN RELATIONS ISSUES CONSENSUS STATEMENT*

There is ample evidence available that drug abuse is a significant problem for the work setting and that any solution to the problem demands a multidimensional approach which includes identification, education, prevention, and treatment.

The goal of an employer's policy should be to maintain a work force free from impairment by drug effects detrimental to productivity, safety, and health, and at the same time to offer any employee who does not meet those conditions an opportunity, consistent with other employer policies, to be restored to an optimal level of performance.

In any company the Human Resources Group should play a leadership role in the formulation of a drug abuse policy. Representatives from medical, employee assistance, security, and labor relations groups should be active participants together with a broad-based representation from line management. Labor union participation and support are highly desirable and will facilitate and enhance the ultimate success of such a policy. Union representatives should be encouraged to participate in the same manner as they do in the development of other resource policies.

Communication of the policy is primarily the responsibility of the Human Resources Group with the active involvement of line management and union representatives. Training staff may also be called upon to assist in carrying out these responsibilities. The implementation of the policy is a line management responsibility to be carried out with the full support, advice, and counsel of the Human Resources Group,

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*Members of this panel demonstrated broad experience in the human resources area and included representatives from the human relations departments of public utility, pharmaceutical, electronics, mining, and mass transit companies, an EAP consulting firm, an arbitrator, the Chamber of Commerce, national labor unions, and the Federal government.

including medical, employee assistance, labor relations, etc. In addition, Human Resources should monitor the application of the policy to ensure fairness and consistency.

Given what is known about the progressive nature of chemical dependency, employers are encouraged to include provisions for early identification which is desirable for optimal intervention. Specifically, employers are encouraged to develop employee assistance plans (EAPs) to reach drug-abusing employees.

Laboratory tests of breath, urine, and/or blood, are useful tools to establish that drug use has occurred at some time. Extreme caution must be exercised to assure that the collection, handling, and testing procedures are reliable and accurate. Prior to instituting testing procedures, the employer should establish a clear relationship between drug abuse and job performance, as well as what actions, such as referral to treatment, will follow positive results. A single positive test result, even if confirmed, should not form the sole basis for disciplinary action; consideration of factors such as work history, public safety, and security issues would also bear on the determination of any remedial action. The criteria for preemployment, for-cause, random, and scheduled testing are entirely separate. Random testing may be used only in the most extreme circumstances. The panel, however, was unable to reach a consensus on a definition of these circumstances. The representatives from major labor organizations abstained from this paragraph on laboratory testing.